# THE CONVEYANCER AND PROPERTY LAWYER

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## CONVEYANCER'S NOTEBOOK

### THE LAW SOCIETY AND RETIREMENT BENEFITS

We do not think the decision of the Law Society not to set up their own privately administered scheme under the Finance Act, 1956, should pass without comment. The reasons given are that "the Society would not be in a position to quote guaranteed minimum annuities in respect of solicitors' contributions as and when they were made; the administrative expenses of the scheme might well be high, expert advice on investments would have to be paid for and the annuities ultimately payable would depend on the success or otherwise of the trusteees' investment policy over the intervening years" (*Law Society's Gazette* (1956), vol. 53, p. 360; to the like effect, *ibid.*, p. 533). These reasons will not bear examination. It is true that the Society would not be in a position to quote minimum annuities, but are solicitors really so short-sighted as merely to look to a fixed figure at some future date regardless of its purchasing power? In quoting a minimum an insurance company is bound to be on the conservative side and a privately administered scheme does hold out greater hopes of protection against inflation. Many commercial companies have with success administered pension schemes, both contributory and non-contributory, with pensions depending on numerous contingencies without feeling the necessity of going to insurance companies to do the job for them. The Society could find out what annuities are likely to provide with increasing accuracy as the years go by. After all, what are actuaries for?

Secondly, why should the administrative expenses be so high? We commend to the Law Society Hosking's *Pension Schemes and Retirement Benefits* (which is reviewed *post*), particularly at pp. 34

and 191. Why should the Law Society find it so expensive to run a scheme when commercial concerns have found otherwise?

As to investments, if the Society feel unable to find out how to invest the assets of such a fund there are institutions which would be quite prepared to do this for them until they feel more confident.

There is, however, more involved than this. First, under the Act a scheme has to be established " by a body of persons comprising or representing a substantial proportion " of those engaged in a particular occupation or group of occupations, so that if the Law Society or a provincial Law Society do not set up a scheme, a solicitor has no alternative but to go to an insurance company. Solicitors ought at the least to have the choice of their own scheme or an office one. Secondly—and this is far more important—if the Law Society feel unable to run their own scheme for the reasons given by them, are they not falling into the same error as solicitors formerly fell into in the case of taxation of abdicating part of their proper professional sphere? How can they properly advise on pension schemes generally if they are unable to run their own? If solicitors are to turn to all employers and tell them to get an insurance company to run their pension schemes for them, they are most assuredly going to lose some of the confidence which they have been so painfully building up since they started to learn, equally painfully, about taxation. It is, fortunately, true that solicitors have not been taking this timid line, but so long as they have not got their own scheme they lay themselves open to this criticism. In fairness, we ought to mention that the Chartered Accountants, like the Law Society, are not running their own scheme.

### Report of The Law Reform Committee on The Rule Against Perpetuities

The Report of a particularly strong Law Reform Committee on the Rule against Perpetuities (Cmnd. 18, H.M. Stationery Office, price 1s. 6d.) contains a number of recommendations which will command a wide measure of support. Anyone who has observed the effects of a settlor's or testator's ability to tie up land indefinitely in a jurisdiction where there is no rule against perpetuities, *e.g.*, the perpetual use as a farm of mineral or oil bearing land, will agree that the general abolition of the rule is unthinkable and, having regard to the fact that the formula for calculating the period bears a direct relation to the most common limitations, it is equally clear that there should be no change in the period. It is the way in which the sub-rules have proliferated and the unimaginative—or, when we bear in mind, the court's attitude towards the ability of womankind to bear children, should we say imaginative?—manner of

applying that rule that has caused hardship. The first recommendation of the Committee is that the draftsman may select, if he wishes, a fixed period of years not exceeding 80 as the perpetuity period. In the case of pension schemes, purpose trusts and the like, when any period is bound to be artificial, this is a sound recommendation: it is always unsatisfactory to draft an instrument containing a provision which a layman regards as an example of mumbo-jumbo.

The second important recommendation is that the operation of the rule should depend upon what in fact occurs, the principle of "wait and see," and not on what might (but almost certainly will not) occur. The silly assumption that a perfectly normal man of forty of fifty may in due course marry somebody at present unborn will be swept away and, as a corollary, the committee recommend that there should be a rebuttable presumption that a woman of fifty-five or over is incapable of bearing a child and at the other end of the scale that no one under the age of fourteen can procreate or bear a child. Evidence will be admissible in any case to show a particular person of any age cannot procreate or bear a child, which will enable some trust funds to be distributed where no other beneficiaries will in fact come into existence.

Options to acquire interests in land received special attention. At present there are the statutory provisions that a reversionary lease can, in general, only be granted if it takes effect within twenty-one years (L. P. A., 1925, s. 149 (3)) and an option to renew a lease for a term exceeding sixty years is void (L.P.A., 1922 s. 145 and 15th Sched., para. 7 (2)). Subject to this, an option to renew is outside the perpetuity period, though a perpetually renewable lease will now become a term for 2,000 years, and the benefit of such an option runs with the lease. An option to purchase is subject to the rule, except in so far as it creates a mere personal contract: *Hutton* v. *Watling* [1948] Ch. 26; and see *Wright* v. *Dean* [1948] Ch. 686, but the benefit does not run with the lease. The Committee recommend that options to purchase contained in leases should be outside the rule, but other options to purchase should only be exercisable for a period of twenty-one years and thereafter should cease to be valid for all purposes. Again, these recommendations will command assent.

We enter on more controversial ground when we come to possibilities of reverter, rights of re-entry and analogous matters. One of the difficulties at the moment is that the law on the subject is obscure, and the suggestion that the law should be clarified one way or the other is to be welcomed. Rights of re-entry are in general subject to the rule, but possibilities of reverter are not. The

Committee recommend that possibilities of reverter and analogous interests in the case of personalty should be made subject to the rule. There are cases of gifts to charities on condition where it is quite inequitable that the condition should be ignored, and in many cases the most convenient way of framing the gift is by way of a determinable limitation. Again, owing to the difficulty of making positive covenants run with the land, a problem of peculiar interest to persons selling freehold flats, it is desirable, and reasonable, to have rights of re-entry exercisable for indefinite periods. In the case of rights of re-entry annexed to rentcharges the Committee recommend that the rule should not apply—the generally accepted view is that the rule does not apply at the moment, but the statutory provisions are not too happily phrased—and there seem strong grounds for treating possibilities of reverter and rights of re-entry generally in the same way. The possibility of hardship resulting because of the relevant condition becoming obsolete or being breached accidentally could easily be overcome by an extension of sections 84 and 146 of the Law of Property Act, 1925.

It is not, perhaps, an unfair inference to draw that the Committee have doubts about the soundness of *Re Astor's Settlement Trusts* [1952] Ch. 534; they say that it can be read as suggesting that the general rule is that all purpose trusts are void. Assuming that such trusts can be valid, it is recommended that the rule should continue to apply to them. It would be an advantage if the law laid down in *Re Astor* could be altered by legislation, although the subject was outside the terms of reference of the Committee. It is a decision which has been consistently ignored in practice and serves no useful purpose.

Thirdly, the Committee do not recommend the abolition of the rule with regard to pension schemes, taking the view that as such schemes can be registered under the Superannuation and Other Trust Funds (Validation) Act, 1927, in which case it does not apply, and there is no need for it. But there are objections to registration under the Act, as witness the fact that well under 500 schemes are registered under the Act, and one wonders what useful purpose is served by winding up such schemes at purely arbitrary dates. Trustees of such schemes are placed in an awkward position in deciding on investment policy when the period applicable draws towards its close. These difficulties have probably not been felt yet, but the matter should not be left until they are.

### Schedule A Tax on Flats

The moral of *Gatehouse* v. *Vise* [1956] 1 W.L.R. 1509 (noted *post*) is never to trust the Government. It will be remembered

that Sir Stafford Cripps threatened that Mr. Cube would have to be supported out of capital, but the courts disagreed with him all along the line. In 1954, in reply to a question in Parliament, it was stated that where flats were sold on long leases at low rents, the lessees and not the lessors would be assessed to Schedule A tax, and all the books were wrong. Many practitioners were rather dubious about this statement of law though welcoming it as a statement of practice. Danckwerts J., applying the *Westminster Chambers* case (1876) 1 Ex.D. 469, has held that, in the ordinary case, the lessor is assessable. There is no doubt that many leases have been granted on the footing of the Government's statement of practice. With a well-drawn lease the lessor can ensure that the ultimate burden is thrown on the lessee whoever is assessed, but there are still difficulties. A lessee in the surtax class will still secure an advantage by having the lessor assessed even if he has to repay the lessor. Where the freehold is in a management company owned by the lessees, it will always be advantageous to have the lessor assessed. On the other hand, if the lessor is assessed the lessee will not (except by concession) be able to put in a maintenance claim. We have not heard whether the Revenue practice has yet been changed. It is to be hoped that we will not have to wait for *Gatehouse* v. *Vise* to go through both the higher courts before the law is changed. One thing is clear, that the law should be changed as quickly as possible. Incidentally, the lessor in *Gatehouse* v. *Vise* has little cause for complaint, for he took a covenant from the lessee to pay rent "without any deduction whatsoever except for Landlords Property Tax."

### Gifts Within Five Years of Sale

Another recent decision to which we draw attention is *Manning* v. *Turner* [1956] 1 W.L.R. 91 (noted *post*). The vendor had acquired the land by gift within five years of the contract of sale and the purchaser asked him to take out a policy to cover possible liability for death duties as a result of the gift. When the vendor failed to do so within a reasonable time the purchaser rescinded. With respect, this state of affairs should never have arisen. Such a gift seems to be an incurable blot on the title and the point should have been dealt with in the contract. As this was not done, the purchaser's requisition was more than reasonable, for there seems to be no way of forcing the defect on the purchaser: the case is clearly not authority for saying a purchaser can be compelled to accept the defective title plus an insurance policy.

# DISCHARGE AND MODIFICATION OF RESTRICTIVE COVENANTS—II

By G. H. Newsom, Q.C.

## Unsuccessful Applications

The previous article was concerned mainly with those cases reported in Volume 7 of the *Planning and Compensation Reports* in which the Lands Tribunal has decided to grant at least some relief. But a very substantial proportion of the contested applications do not succeed. Indeed, in about half the cases reported in that volume the applicants failed altogether, and in a few more they obtained relief of a kind substantially less beneficial than they were seeking. It is possible to gather as much useful knowledge as to the Tribunal's attitude to cases under Law of Property Act, s. 84 (1) from the reports of the unsuccessful applications as from those of the successful ones.

## Flats Not Necessarily a Sufficient Change

Thus in *Re Davis' Application* (*t*) it was suggested, amongst other things, that there was a change in the character of the neighbourhood, rendering obsolete the covenants for securing that only private houses should be erected, because some existing houses had been converted into flats. This submission was rejected. The Tribunal said that the character of a neighbourhood " derives from the style, arrangement and appearance of the houses on the estate and from the social customs of their inhabitants, and there is no evidence that those factors have in any way been affected, or that the value of or demand for houses in the neighbourhood has in any way been depressed." Similarly, in *Driscoll* v. *Church Commissioners for England* (*u*), where the covenantees had allowed the conversion into flats of many of the houses in an area where all the houses were originally in single private occupation, under a covenant which so provided, Denning L.J. said that the covenant was not obsolete because, *inter alia*, " It enables the (covenantees) to keep the area as a residential area, instead of being used, as it might have been, for commercial purposes." Thus if the applicant proves that a neighbourhood consisting formerly of good private residences each in a single occupation has become one of houses converted into good flats, the Tribunal would, no doubt, be justified

(*t*) 1335.
(*u*) [1956] 3 W.L.R. 996.

in allowing other such conversions, but usually not in modifying the covenant to allow user otherwise than for purposes of private residence. In these days it is often the best way of keeping up a neighbourhood to allow the conversion into good flats of houses that are too big to be occupied singly. In *Re Snowden's Application* (*v*), for instance, the Tribunal accepted the submission that the flats there contemplated would not lower the neighbourhood at all. Indeed, with a large old house there is always a danger that if the covenant requiring single occupancy is not modified the house will become derelict and an eyesore: in such a case conversion into flats would actually raise the standard.

### Paragraph (a): "Other Circumstances"

The first limb of paragraph (a) provides that the covenant may be deemed obsolete not only by reason of changes in the character of the property or neighbourhood, but also because of "other circumstances of the case which the Authority may deem material." This provision is sometimes useful, though the occasions for its operation are few. Practically the only instance in which the Tribunal has acted under this provision was in *Re Hickman & Sons, Ltd.'s Application* (*a*), a case where the facts were very unusual. The Tribunal discharged the covenants affecting part of a building estate on the outskirts of Luton. A scheme of development had been created in 1920 requiring the plots to be used only as allotments until 1934, and thereafter for small private houses. For various reasons the development with houses had never started and the estate was really dormant. The local authority had produced a plan for the development of the estate with light industrial buildings, which the Tribunal considered as showing "an inevitable trend which cannot be ignored." It could not be said that there was a change in the character of the neighbourhood, for "the estate does not yet possess any particular character which is capable of showing change." But the facts amounted to "other circumstances" which entitled the Tribunal to say that the covenants were obsolete. This, incidentally, was a case in which the Tribunal could almost certainly have acted under paragraph (c), and it appears to have been invited, in the alternative, to do so. But, owing apparently to the fact that paragraph (a) comes before paragraph (c), the main argument developed on paragraph (a), and when the applicants succeeded on that, there was no need to apply paragraph (c) also. At the present time, the prospects are that paragraph (c)

(*v*) LP/17/1954.
(*a*) LP/26/1950.

would be argued first, as giving the applicant an easier task than paragraph (a) does.

The provision as to "other circumstances" was in effect invoked by the applicants in *Re Reid's Application* (*b*). The applicant had some plots on an estate subject to covenants requiring their user only as private gardens and forbidding animals to be kept thereon. He had established a piggery on his plots during the war, by the authority of Defence Regulation 62B. On the regulation lapsing, he sought to have the covenants modified to allow the existing user as a piggery to continue. The applicant argued, among other things, that the present economic state of the country required the maximum food production at home, and that a covenant conflicting with such economic requirements was obsolete. This submission failed, the general economic state of the country not being in itself enough to ground the Tribunal's action, apart from the fact that the authorities had allowed the Defence Regulation to lapse and so did not seem particularly concerned with the economic argument in such cases as this.

### Discretion of the Tribunal

Some argument has developed on the extent of the powers of the Tribunal in those cases where it holds that the circumstances specified in one or more of the three paragraphs of section 84 (1) are fulfilled. In *Re Truman, Hanbury, Buxton & Co., Ltd.'s Application* (*c*) the Tribunal said, in stating the case for the Court of Appeal, that it would not, in any event, have exercised its discretion in favour of the applicants (*d*). One of the grounds of the appeal was that the Tribunal was wrong in construing section 84 (1) as giving the Tribunal a discretionary power to modify or discharge a covenant if it were satisfied that the applicant had proved any one of the grounds stated in paragraphs (a), (b) or (c) of the subsection. The Court of Appeal upheld the Tribunal's finding that none of those grounds had been established, so that the question as to the discretion did not arise: the court therefore expressed no opinion upon it. The point arose for decision by the Court of Appeal in *Driscoll* v. *Church Commissioners for England* (*dd*) and it was there held that the Lands Tribunal, having found that a case is one in which it could exercise its powers, has a discretion whether or not to do so. The Tribunal

(*b*) LP/27/1954.
(*c*) [1956] 1 Q.B. 261.
(*d*) *Ibid.*, at p. 265.
(*dd*) [1956] 3 W.L.R. 996.

has consistently held in such cases as the point arose that it has a discretion. Thus it did so in *Re Heath's Application* (*e*), *Re A. H. Field & Co. (Developers) Ltd.'s Application* (*f*), *Re Morgan's Application* (*g*), *Re St. Albans Investments, Ltd.'s Application* (*h*), *Re Pioneer Properties, Ltd.'s Application* (*i*) and *Re Hedges' Application* (*ii*).

The decision of the Court of Appeal in *Driscoll* v. *Church Commissioners for England*, establishing that the Lands Tribunal has the discretion which it has consistently claimed, must necessarily reduce the opportunities for an unsuccessful applicant to appeal. If an application succeeds, it will still be as much open to the objectors to appeal as it was before. For their appeals have always been on the footing that no paragraph of section 84 (1) applied to the case in hand. An unsuccessful applicant may have lost either because the Tribunal held that none of the paragraphs was applicable, or because, whether or not one or more of them did apply, it thought the case unsuitable for an order under section 84 (1). The applicant cannot challenge the latter kind of finding except on one or other of the very limited grounds on which the exercise of a judicial discretion can be challenged. Thus, in *Driscoll* v. *Church Commissioners for England*, Hodson L.J. stated that even if the court had upheld the appellant's submissions on the law "it would be . . . really futile to send this case back for a reconsideration of the exercise of the discretion, because no directions which we could give would be likely to produce a different result from that which was reached—on the footing that he had discretion—by the President in the case." Broadly, then, the effect is to bring the present situation closer than might at one time have appeared to that which obtained before the Lands Tribunal Act, 1949, when an appeal lay from an order of the Authority, but no appeal from its refusal to make an order. Now, the latter kind of appeal does lie, on case stated, but it is not often likely to be useful in cases where the Tribunal has grounded its refusal wholly or partly on discretion.

### Temporary Modification: is not within Section 84 (1)

If the Tribunal decides that it can and should act, the subsection confers on it power "by order wholly or partially to discharge or modify" the restriction. The words "wholly or

(*e*) LP/2/1953.
(*f*) LP/88/1954.
(*g*) LP/64/1955.
(*h*) LP/1/1956.
(*i*) LP/143/1955.
(*ii*) LP/136/1955.

partially" were considered in *Re Taroads, Ltd.'s Application* (*k*). In that case the land had been sold for residential development before the war, with covenants imposed for that purpose, but had been used for several years during and after the war by the applicants for storing the vehicles which they used in their business of spraying roads with tar, under a licence for the duration of hostilities and six months thereafter. The licence having lapsed, the applicants made an application in 1950, which was heard in 1951, to discharge the covenants until the end of 1952, to enable them to carry on while they sought other premises. The Tribunal held that the word "partially" did not entitle it to discharge the covenant for a limited time, and that its only power was to deal with "the actual conditions of the restriction in a material sense." The application was refused.

### Compensation never awarded by Tribunal

The subsection further provides that any modification or discharge that is granted may be "subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order." Before the Lands Tribunal Act, 1949, came into force there had been a number of decisions of the Authority modifying or discharging covenants and awarding compensation to objectors. It may be said that in the words cited above the legislature apparently contemplated that proper cases for compensation could and would arise at least occasionally. But the danger of such a procedure is that the Tribunal could easily slip into a practice of expropriating the rights of those who are entitled to the benefit of a restriction on terms that they shall receive compensation. Thus, the subsection could lead to a form of compulsory purchase. But such a course would clearly be in conflict with the observations of Farwell J. in *Re Henderson* (*l*), where his Lordship said "Speaking for myself, I do not view this section of the Act as designed to enable a person to expropriate the private rights of another purely for his own profit. . . . If a case is to be made out under this section, there must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the person who is enjoying the benefit of it, or that by reason of a change in the character of the property or the neighbourhood, the restriction is one which is no longer to be enforceable or has become of no value."

(*k*) LP/10/1950.
(*l*) [1940] Ch. 835, at p. 846.

The tests here stated by Farwell J. are both in relation to paragraph (a); and if they are fulfilled it is difficult to understand who would be said to suffer loss in consequence of the order: for they involve that the restriction must be already of no practical value. Similarly, if the Tribunal acts under paragraph (c) it does so only because its order will not injure the persons entitled to the benefit of the covenant. So it becomes almost impossible to imagine a case where the Tribunal can properly modify or discharge a covenant and where any one will be a penny the worse for the order. If so, there can scarcely be a case for compensation, and the Lands Tribunal has never awarded it.

There have been a few instances in which the Tribunal has considered the question of compensation and has decided against awarding it. In *Re Davis' Application* (*m*), the Tribunal stated that in its opinion the compensation provisions are directed, *inter alia*, to those cases " where it is clear that town planning provisions will effect an inevitable change of character at some time in the future, and where, in consequence, it is desirable that any new development shall conform with the zoning provisions. Such a situation would . . . constitute such other circumstances of the case as would justify the discharge or modification of restrictions subject to the payment of compensation." But this statement, with respect, ignores the fact that under the " other circumstances " provision the Tribunal must find that the restriction ought to be deemed obsolete (not merely obsolescent). If so, how can anyone suffer loss through it being discharged? *Re Davis' Application* (*n*) was a very early case after the Lands Tribunal Act, and in any event no compensation was there granted. But it would be dangerous to assume that the observations quoted above represent the present considered view of the Tribunal.

The possibility of compensation was also considered in another early case, *Re Coulsdon & Purley U.D.C.'s Application* (*o*), where the application succeeded and one objector claimed compensation. His claim failed, the Tribunal finding that he would suffer no loss from its order.

In *Re Taylor Walker & Co., Ltd.'s Application* (*p*) a Tribunal consisting of two members found in terms that there had been no change in the character of the neighbourhood and that the execution of the applicants' proposals would injure persons in the immediate vicinity. They then added the observation: " We also

(*m*) 1335.
(*n*) 1335.
(*o*) LP/21/1950.
(*p*) LP/4/1952.

find that since the applicants' proposals have in them insufficient compensating advantages in favour of the local residents, this is not a case in which a modification or discharge of the covenants can be ordered subject to the payment of compensation. We therefore order that the application be dismissed." This comment is, with respect, completely wrong in principle, in that it implies that there may be cases in which, despite the failure of the applicants to bring themselves squarely within any one of the three paragraphs, the Tribunal might modify the covenants with compensation. It is apparently suggested that this course might be taken on the basis of the town planning consideration of "compensating advantages in favour of the local residents." There is nothing in section 84 (1) to justify such a view.

The latest case reported in Volume 7 of the *Planning and Compensation Reports* in which reference was made to compensation is *Re Knott's Application* (*q*), the Berkeley Square case. Here the objectors, who were the applicants' lessors, asked for compensation in respect of an order authorising the user of the applicants' leasehold premises for business offices. The claim was put on two grounds: (a) that the applicants' proposed offices would compete with the offices on the lessors' land next door, and (b) that the value of the applicants' leasehold would be enhanced, and the freeholders ought to be allowed a share. These two grounds both being absurd, (a) was withdrawn at the hearing and (b) was dismissed. *Re Knott's Application* (*q*) was decided in 1953, and since then opinion has evidently so crystallised against the awarding of compensation, that little or nothing more has been heard of it.

### New Construction or Change of User

The cases dealt with by the Lands Tribunal under Law of Property Act, s. 84 (1) may be divided into two broad classes in respect of the relief sought. In cases of the first class, the substantive relief consists in allowing the erection or alteration of buildings which the existing restriction would have forbidden. In those of the other class, the substantive relief consists in allowing a user of the land or the buildings thereon in a way which the existing restriction would have forbidden. There is, of course, a good deal of overlapping between the two classes, and cases may well arise where the formal question is whether there may be a change of user while the substantive question is as to the erection of buildings, or vice versa. But it is generally clear into which class the case falls, so far as the real subject-matter of the Lands Tribunal's decision is concerned.

(*q*) LP/21/1953.

### Density

A very considerable proportion of all the applications made to the Lands Tribunal under section 84 (1) is directed to increasing the density of dwellings, sometimes by converting an existing house into flats, sometimes by demolishing an existing house and erecting a new block of flats, sometimes by building on the garden of an existing house, and sometimes in other ways. Applications of these kinds frequently succeed; occasionally they fail because the project would injure persons who have (or at least who claim to have) the benefit of a covenant forbidding the project. Normally, cases of this sort do not involve the introduction of a new kind of user into a vicinity. The surrounding premises are generally used for the purpose of residence, and the applicant's project is for that purpose too. The question is really whether his proposed methods of building or conversion are suitable.

### Change of User

But where the substantial issue is whether a change of the kind of user is to be permitted, the situation is very different. The Tribunal does not grant such applications at all freely, and proposals for certain particular sorts of user are almost invariably rejected.

### Alcohol

Thus, there has been a number of applications for the modification or discharge of covenants the effect of which is to prohibit the sale of alcohol. Eight such cases are reported in Volume 7 of the *Planning and Compensation Reports*: the applicant succeeded in only one of them. Thus in *Re Coulsdon & Purley U.D.C.'s Application* (*r*) the applicants wished to erect a community centre, with a car park, on land subject to restrictions. One of the restrictions expressly forbade the sale of alcohol, and others would have prevented the erection of the community centre, whether or not alcohol was served there. The applicants sought the discharge of all those restrictions. The application succeeded except that the erection of a public-house or a factory was to continue to be prohibited. And in *Re Solihull U.D.C.'s Application* (*s*) the Tribunal dismissed altogether an application for the discharge of covenants affecting a site in a residential area on which the applicants wished to erect a community centre at which dances would be held and alcoholic liquor sold.

(*r*) LP/21/1950.

(*s*) LP/35/1952.

In *Re William Cooper & Sons, Ltd.'s Application* (*t*) the applicants owned flats on an estate, subject to covenants forbidding any user except for the purposes of private residence. They sought a modification to enable them to erect a public-house. The application failed. In *Re Taylor, Walker & Co., Ltd.'s Application* (*u*) a like application failed in respect of a site in a village on the London-Southend road, on the ground that the erection of a public-house would attract intruders from outside the district and cause disturbance. A similar decision was given on similar grounds in *Re Truman, Hanbury, Buxton & Co., Ltd.'s Application* (*a*). In *Re Tooth's Application* (*b*) the applicants had an hotel subject to a restriction forbidding the sale of alcohol except with a meal costing at least 3s. 6d. They sought to have this restriction discharged: the application failed. The same result was reached in *Re Lodge Plugs, Ltd.'s Application* (*c*), where the Tribunal was asked to allow the sale of alcohol at the pavilion on the applicant's playing fields. But in *Re Charrington & Co., Ltd.'s Application* (*d*) the applicants successfully applied for modification of an express covenant forbidding the sale of intoxicants, to enable them to move an existing licence to premises a few yards away from its existing site. This application succeeded: but the circumstances were peculiar, in that the move was not going to increase the number of public-houses in the vicinity and both sites were near the boundary of the burdened land, the old one just off it and the new one just on it.

### Noises, Smells and Crowds

Besides the sale of alcohol, there are other kinds of project which it is difficult to persuade the Tribunal to facilitate. Thus proposals of any kind which would tend to cause noises, smells or the collection of crowds are normally unsuccessful. In *Re Hobbs' & Marshall's Application* (*e*) the applicants sought the modification of a restriction in order that they might use certain premises as a proprietary club or restaurant and tea rooms. The application failed; the Tribunal put its decision on the ground of injury to neighbouring property that would be caused by the resultant increase in traffic at a congested corner and the concentration of cars in the parking place of the applicants' premises.

(*t*) LP/15/1950.
(*u*) LP/4/1952.
(*a*) [1956] 1 Q.B. 261.
(*b*) LP/34/1952.
(*c*) LP/14/1955.
(*d*) LP/24/1950.
(*e*) LP/20/1950.

As we have seen, in *Re Solihull U.D.C.'s Application* (*f*) the applicants were refused authority to conduct a community centre at which liquor would be sold in a residential area: the decision was founded on the noise and disturbance associated with the holding of dances and suchlike gatherings. In *Re Munday's Application* (*g*) the project which the Tribunal rejected was public entertainment with mechanical devices; and in *Re Hall & Co., Ltd.'s Application* (*h*) it was the extraction of gravel, a noisy operation. A piggery was rejected on the ground of noise and smell in *Re Reid's Application* (*i*), and a piggery and chicken farm were also rejected in *Re Utting's Application* and *Re King's Application* (*k*). In *Re Middlesex County Council's Application* (*l*) and *Re Wakefield Corporation's Application* (*m*) local authorities applied unsuccessfully for modifications to enable them to construct public conveniences. Plans for a garage and a petrol filling station were refused the necessary modification in *Re Escritt's Application* (*n*). Schools have fared rather better. In *Re Chaumel's Application* (*o*) covenants forbidding the user of property at Kingston Hill, Surrey, for any purposes except private residence were modified to the extent of permitting a house to be used as a nunnery and preparatory day school for 100 girls. But in *Re Vaughan's Application* (*p*) the modification of a similar covenant was not granted in respect of premises at Cheam where the applicant wished to establish a school for senior girls: the Tribunal expressed regret in reaching that conclusion.

### Reception of Mental Defectives

A somewhat different problem arose in *Re Dr. Barnardo's Homes' Application* (*q*) where there was a large country house which the applicants wished to sell to purchasers who would use it as an institution for the reception and care of mental defectives. A subsisting covenant forbade the premises to be used as an asylum for the insane. It was not entirely clear that this covenant prohibited the proposed user, but the application was made on the footing that it did. There was evidence, which the Tribunal

(*f*) LP/35/1952.
(*g*) LP/59/1953.
(*h*) LP/46/1954.
(*i*) LP/27/1954.
(*k*) LP/93/1955, LP/86/1955.
(*l*) LP/8/1952.
(*m*) LP/15/1952.
(*n*) LP/73/1953.
(*o*) LP/12/1952.
(*p*) LP/70/1954.
(*q*) LP/102/1954.

accepted, that the proposed establishment would cause no more danger, inconvenience or annoyance than the children's home, for which the premises had previously been used. But the Tribunal also found that there was a public prejudice against establishments of this kind, and that such prejudice, however ill-founded, might well lead to injury to the objectors.

### Churches and Church Halls

There has been a number of cases in which the applicants have sought the modification of covenants to enable them to build churches or church halls. Thus, in *Re Sanderstead Parochial Church Council's Application* (*r*) the Tribunal, with some apparent hesitation, allowed the discharge of some modern covenants to enable a church hall to be built. The Tribunal imposed conditions prohibiting any building on the land being used as a public-house or a beerhouse or as a manufactory or works. The Tribunal's doubts seem in part to have been resolved by the fact that the site was quite near that of the community centre which had recently been the subject of a successful application by Coulsdon & Purley U.D.C. (*s*). A Christian Science Church was allowed to be introduced into a residential estate near Birmingham in *Re Berridge's Application* (*t*), but only on stringent conditions, one of which forbade the use of the building for such weekday functions as bazaars. In *Re Cowderoy's Application* (*u*) the applicants sought the discharge of covenants imposed on residential property near Eastbourne to enable them to construct a Roman Catholic church, with parking accommodation for the congregation and a church hall. Although the Tribunal expressed the opinion that it was extremely improbable that anyone had the right to enforce the covenants, it refused to discharge them, or to modify them to the extent of allowing the erection of the proposed church hall. On the other hand, it allowed a church to be built, conditionally on no external bells being rung, and parking accommodation to be provided. The criterion in this, as in many other, cases was whether each project would tend to cause disturbance.

### Proposed User not Causing Disturbance

Applications to modify covenants as to user for enabling activities which do not involve disturbance frequently succeed, even where the new user will be radically different from the old. Thus

(*r*) LP/25/1953.
(*s*) LP/21/1950.
(*t*) LP/34/1953.
(*u*) LP/72/1953.

a private unlicensed hotel was allowed in the residential district of Kensington Court: *Re Holmans' Application* (*a*). Again, a guest house was allowed in a by-road in Harrow: *Re Kohout's Application* (*b*). Business offices have been allowed in Berkeley Square, in a residential area of Canterbury and in Charles Street, Mayfair: *Re Knott's Application* (*c*), *Re Harte-Lovelace's Application* (*d*), and *Re London Investment & Mortgage Co., Ltd.'s Application* (*e*). And a waterworks sub-depot has been allowed on the outskirts of Southampton: *Re Southampton Corporation's Application* (*f*).

### Costs

Finally, there is the question of costs. The President of the Lands Tribunal has stated, in a practice note dated May 27, 1954, that he is reluctant to award costs against an objector unless the objection is frivolous or vexatious. The applicant comes to the Tribunal to seek a privilege, and usually for the purpose of profit. It is in the Tribunal's interest that objectors with reasonable objections should appear to state their cases, the better to enable the Tribunal to exercise the discretion given to it by the subsection. It is impossible to analyse with complete accuracy the decisions as to costs in the cases before the Tribunal which are reported in Volume 7 of the *Planning and Compensation Reports*, owing to the fact that in some cases the applicant succeeded in part and failed in part. But the following figures will show for most practical purposes how the Tribunal deals with costs. One of the seventy cases reported in the volume was reported only on an interlocutory point. In the other sixty-nine the orders as to costs were as follows:

(a) Successful applicants awarded costs against objectors .. .. .. .. .. 3 (2 on High Court scale)

(b) Successful objectors awarded costs against applicants .. .. .. .. .. 28 (5 on High Court scale)

(c) Unsuccessful objectors awarded costs against applicants .. .. .. .. 14 (1 on High Court scale)

(d) No order as to costs .. .. .. .. 24

The cases in which there was no order as to costs were mainly

(*a*) LP/8/1951.
(*b*) LP/15/1951.
(*c*) LP/21/1953.
(*d*) LP/26/1954.
(*e*) LP/8/1955.
(*f*) LP/79/1955.

those in which the application succeeded, and the objectors had neither a particularly strong nor a particularly weak case. The effect of these figures is that an applicant should be advised that he will at least have to bear his own costs (unless he happens to have purely captious opposition) and that he may easily have to pay the objectors' costs even if successful. An objector with a reasonable case should be told, on the other hand, that the worst that is likely to happen to him is that he will lose and have to pay his own costs. On the other hand, he may easily be awarded costs even if he loses. And if he wins he is almost certain to be awarded costs.

The scale of costs is in the discretion of the Tribunal, but the commonest order is for taxation on County Court Scale 3, frequently with discretion to the Registrar as to counsel's fees and sometimes also as to expert's fees. Occasionally the scale is that of the High Court or some County Court Scale other than scale 3. And there have been occasions when the Tribunal has awarded lump sums for costs; such sums are usually small ones.

### Subsection (2) of Section 84: The Court

The advisers of a person who owns land, the title to which requires to be cleared of restrictions, have first to choose whether the application is to be made under subsection (1) or subsection (2) of section 84. This choice is not always an easy one and should not be made too early in the investigations. If at the outset there seems to be some reason to suppose that the restrictions are no longer enforceable, or do not as a matter of strict construction stand in the way of the applicants' plans, serious consideration should be given to making an application to the court under section 84 (2) for an order declaring the covenants unenforceable or that they do not forbid a given activity. It is especially necessary to consider this form of application in a case where there is likely to be serious local opposition to the applicant's proposals. For on such an application the respondents, like the applicant himself, can argue only the dry and technical questions of law: before the Tribunal they can argue the merits of the proposals.

### Court or Tribunal

The first step is therefore for the applicants' advisers to consider the question whether the restrictions are enforceable. It is usually possible to say, on a preliminary examination, within quite narrow limits what are the issues on which this question will turn. If there seems to be a reasonable likelihood that the

covenants will be found unenforceable, much more elaborate inquiries should be made. These inquiries must be full and meticulous, and should be conducted on the footing that preparations are being made to settle an affidavit or affidavits in support of the application which will state all the relevant facts exhaustively, so that there is no need for any other evidence. It is not too much to say that cases under section 84 (2) are usually won or lost by the draftsman of the initial affidavits. Further, if the case is a sound one, it is normally most important to prepare those affidavits in such a way that an objector who is hesitating whether to become a respondent, or to continue as a respondent, will decide not to pursue his opposition further. In a great many cases under section 84 (2) it is necessary to adduce evidence negativing a scheme of development under *Elliston* v. *Reacher* (*g*). The best evidence on this point is that of the common vendor or his solicitor, if available. If the crucial date was long ago, the best evidence is usually that of the successors in practice of the common vendor's solicitors, if they can depose that they have searched the papers and find no traces of a scheme.

If at this early stage it seems likely that the restrictions are still enforceable, and do forbid the proposed user, the application will of course be made in the Lands Tribunal. But there is another class of cases also: sometimes the restrictions appear on a preliminary view to be likely to prove unenforceable, but it also appears unlikely that there will be any, or any substantial, opposition to the applicant's project. Cases of this sort may very well arise where there has been an obvious change in the character of the vicinity, but where it is necessary to remove restrictions from the paper title of the applicant in order to satisfy a purchaser from him or his intending mortgagee. The Tribunal has expressly recognised that a purchaser from the owner, under an uncompleted contract, has a sufficient interest to enable him to apply to the Tribunal: *Re Pioneer Properties, Ltd.'s Application* (*h*). In such a case, there is much to be said for applying not to the court but to the Lands Tribunal. For the court in deciding a case under section 84 (2) is making a declaration of legal rights, and never makes such a declaration without a hearing, even if the application is unopposed by the time that the summons is ready to be adjourned into court (as is true of the great majority of cases). The Lands Tribunal, on the other hand, is able and often willing to make an order discharging or modifying a restriction in an unopposed case without any hearing at all. If all goes well,

(*g*) [1908] 2 Ch. 374.

(*h*) LP/143/1955.

therefore, an application to the Lands Tribunal in a case that is not seriously opposed at any stage is likely to be not only cheaper but decidedly quicker. The applicant's advisers must, however, weigh these advantages against the disadvantage that the Lands Tribunal will probably make an order which merely sanctions specific proposals of the applicant; the court, if it is prepared to make a declaration that the restrictions are unenforceable, destroys them altogether and so gives the owners of the applicant's land a free hand for the future.

### Notices Required by the Court: Re Sunnyfield

Both the court and the Tribunal are acting *in rem*, since their orders under section 84 bind all persons, whether in existence or not, and whether before the court or Tribunal or not: see section 84 (5). Each, therefore, takes precautions to ensure that anyone who could reasonably wish to be an objector or respondent has an opportunity of appearing. The court's rule is that which was laid down by Maugham J. in *Re Sunnyfield* (*i*); it requires that an opportunity to appear shall be given to all those who have a "probable interest" in the subject-matter. The applicant has to satisfy the court itself at the hearing that the necessary notices have been given, and cases are sometimes stood over, after being part heard, for communications to be sent to possible respondents. It is not usual in cases under section 84 (2) to insert advertisements in newspapers. The normal practice is to send a carefully worded letter to a number of surrounding owners and occupiers. The list of recipients is not always easy for the applicant to frame. His case, after all, is that no one is entitled to enforce the restriction: moreover, his submissions will frequently turn on the fact that there is no defined area to be benefited by them. However, he has to do the best he can, and he will be wise to err on the side of sending out too many letters rather than too few. The letters should state that the application is to be made and inquire whether the addressee wishes to be joined as respondent. Frequently they add that the writers give no assurance as to the addressee's costs, and a form of consent to the application (with a stamped addressed envelope) is attached.

### Objectors, Respondents and Costs

The letters are normally not answered at all by a considerable proportion of the addressees; quite a number sign consents.

(*i*) [1932] 1 Ch. 79.

Sometimes one or more objectors declare themselves. Objections are sometimes received from persons to whom no letters have been addressed because they have no possible right to enforce the restrictions (as, for instance, owners of other land subject to the same restriction, and not being within the area of a building scheme). The objectors frequently state simply that they object, without stating whether they wish to be made respondents: if so, they should be pressed for a further answer. The form of letter, the list of addressees and the resultant correspondence should be put in evidence, and the Master is invited at the next appointment to give the applicant leave to join as respondents all those who wish to be joined. The proceedings thereafter take the usual course of an originating summons, and eventually reach the last appointment before the Master, when the evidence is closed and the summons is adjourned into court. The last appointment is an important stage in these cases: for in *Re Ballard* (*k*) Clauson J. held that a respondent who failed at the hearing was entitled to his costs down to and including the last appointment. This order was made on the footing that the applicant initiates the proceedings with a view to clearing his own title, and the respondent is entitled to go into the matter before deciding whether to oppose the application at the hearing. This decision can only be taken with full understanding when the evidence is closed. The respondent is entitled to his costs down to that point; but if he chooses to go on and then loses he must bear the rest of his costs (*l*). It is understood that in an unreported case of *Re Young* in the summer of 1956 Roxburgh J. decided after argument that the costs to be awarded to the respondent should be party and party costs only. But the advisers of an applicant will be wise to be prepared to be generous about the costs of respondents looking into the matter. The timely offer of an indemnity for costs to date, and perhaps of a modest sum of money in addition, will often result in a respondent withdrawing before the hearing: the amount expended may well be saved by the shortening of the hearing, apart from the saving of anxiety to the applicant. On the other hand, there is sometimes a residuum of objectors who are not objecting on grounds of law at all, but wish to urge planning considerations. It is desirable to remind them, and to put the reminder in evidence, of the nature of the proceedings: the reminder can often be effected by a letter inquiring the date of and parties to the instrument under which the objector claims that

(*k*) [1937] Ch. 473.

(*l*) The decision in *Re Ballard* [1937] Ch. 473 about the costs does not appear in the *Law Reports* and is mentioned very shortly in the *All England Reports*. I was present in court and heard it given; the reasoning was as stated above.

he is entitled to the benefit of the restrictions. It is usually worth the applicant's while to spend time and money on the negotiations and exchange of information before the summons is adjourned into court, with a view to ensuring that no effective respondents are left in the case by the time of the hearing. The applicant will still have to satisfy the court; but his task is obviously much lightened by the absence of opposition. In fact most cases under section 84 (2) are unopposed at the hearing: none has been reported since the war, mainly because they are practically never contested by the final stage.

### Notices Required by the Tribunal

The Tribunal's procedure is quite different. The responsibility for seeing that notice is given to possible objectors is accepted by the Tribunal and is attended to during the interlocutory stages of the application. The Tribunal normally orders the putting of notices on the site and the insertion of advertisements in the Press. These announcements offer a far more inviting prospect to potential objectors, whether frivolous or serious, than does the coldly phrased circular that is usually sent out in cases under section 84 (2). Besides, it is generally known that the Lands Tribunal sits locally and is often attended by litigants in person and that solicitors have the right of audience there: an invitation to appear, presumably by counsel, in the Chancery Division in London is a very different matter. It follows that those who have declared themselves as objectors under section 84 (1) have much less at risk in going on than has a respondent under section 84 (2): it is therefore much less often worth the applicant's while to try to induce all the objectors to an application to the Tribunal to withdraw before the hearing. It is sometimes possible to do so, and there are cases in which it is judicious to offer a solatium to the objectors in return for their withdrawal; the objectors will bear in mind that the Tribunal never has awarded compensation. Such an offer cannot safely be made until just before the hearing: otherwise the information may become known and new objectors may come forward. If all the objectors withdraw, it is still a matter entirely for the Tribunal whether there should be a hearing, since the statute gives the Tribunal a judicial discretion in the matter. But in a proper case the Tribunal may intimate that, in view of the case having become an unopposed one, the order will be made without a hearing. Whenever all the objectors have withdrawn, the applicant should consider whether to invite the Tribunal to take this course.

### Restrictive Covenants and the Planning Legislation

Finally, it is necessary to be clear as to the relation of the town planning legislation and planning permissions to cases under section 84 of the Law of Property Act. In the recent action of *Bell* v. *Norman C. Ashton, Ltd.* (*m*) the plaintiff sued for an injunction to restrain the defendants from building more houses on certain land than were permissible under certain enforceable restrictions. A number of defences were raised, one of which was that the planning authority had given permission for the erection of the number of houses which the defendants proposed to erect. Harman J. dealt with this part of the matter as follows: "[The defendants' surveyor] said that town planning approval has been obtained for houses on this scale of density: modern conditions demand that suburban planning should be on that kind of scale: that is the right density at which suburban people ought to live; and if they do not they are obsolete and they ought to be disregarded as being anti-social persons wanting more room that in a crowded country it is right that they should occupy. I must confess that I was much incensed by this evidence. There does remain, in a world full of restrictions and frustration, just a little freedom of contract. I do not see why a man should not contract that he should have half an acre round him and not four neighbours right on him. I do not see why it is anti-social to wish to have a little longer bit of garden or a little wider bit of frontage. To suggest that because these people live on an estate near others where the density is greater their rights ought to be disregarded by the court and swept away is a proposal which I reject with some indignation." As we have seen, the Tribunal observed in *Re Hedges' Application* (*mm*) that the planning history of that case "only shows how little assistance can be obtained by this Tribunal from a decision of a planning authority, when considering cases under section 84."

So far as section 84 (2) is concerned, the court will normally be dealing with the technical enforceability of covenants and not with the applicant's proposed activities. The subsection is wide enough to entitle the court, if so minded, to declare that the covenants are not enforceable in equity because there has been so great a change in the character of the neighbourhood that it would no longer be equitable to enforce them, on the principles laid down either in *Knight* v. *Simmonds* (*n*) or *Chatsworth Estates Company* v. *Fewell* (*o*). There may well be

(*m*) 7 P. & C.R. 359.
(*mm*) LP/136/1955.
(*n*) [1896] 2 Ch. 294.
(*o*) [1931] 1 Ch. 224.

some cases in which the court would deal with such a contention under section 84 (2); but they cannot be frequent, since it is not a matter that can be dealt with satisfactorily on affidavit evidence. In such a case, the fact that planning permission has been given for something which the covenant would forbid may be a relevant fact in ascertaining a tendency or trend in the development of the neighbourhood, taken in conjunction with adequate evidence as to the state and prospects of the surrounding land. But it cannot be more than that. That it is not evidence which can be adduced indiscriminately is amply shown by the remarks of Harman J. in *Bell* v. *Norman C. Ashton, Ltd.* (*p*) quoted above, and indeed it should be handled with the greatest caution. The Lands Tribunal, acting under section 84 (1), would be in the same position in considering the question whether the applicant has brought himself squarely within one or other of the paragraphs of the subsection. Here too any argument founded on the planning permission is liable to be more dangerous than helpful. But it is useful for the Lands Tribunal to have evidence of a planning permission affecting the applicant's land for the sole purpose of defining the precise relief which is sought. The Tribunal does not freely discharge covenants altogether: it prefers to modify them to enable the applicant to carry out a particular scheme. If, then, planning permission has been given for such a scheme, it is convenient to apply for the modification of the covenant to enable the applicant to carry into effect the proposals for which a planning permission bearing a particular reference has been given. This method of definition will likewise be of real assistance in dealing with an application founded on paragraph (c) of section 84 (1), where the crux is whether the proposed development will be injurious to those entitled to the benefit of the restrictions. But, apart from that, the fact that planning permission has been given, though admissible, is not usually relevant.

(*p*) 7 P. & C.R. 359.

# THE COPYRIGHT ACT, 1956

By D. H. Mervyn Davies, Barrister-at-Law

The Copyright Act, 1956 (hereinafter called the Act), will, when it comes fully into operation, be the only source of copyright law in the United Kingdom and Northern Ireland. It will come into operation on such day as may by Order be appointed and different days may be appointed for the purposes of the different provisions of the Act, and for the operation of the different repeals effected by the Act (s. 51). No day or days have yet been appointed under this section. The Act repeals the Copyright Act, 1911, except sections 15, 34 and 37 thereof (see 1956 Act, Ninth Schedule), and provides in paragraph 45 (1) of its Seventh Schedule as follows:—

> "Except in so far as it is otherwise expressly provided in this Schedule, the provisions of this Act apply in relation to things existing at the commencement of those provisions as they apply in relation to things coming into existence thereafter."

The Act is therefore retrospective in the sense that, when it is in operation, United Kingdom copyright will subsist by virtue of the Act whether such copyright came into existence prior to or after the date on which the Act came into operation. Thus an author who has owned the copyright in his book since writing it in say 1926, will henceforth derive his copyright from the Act and not, as hitherto, from the Copyright Act, 1911. The rights in the way of copyright conferred by the Act do, however, differ according as a work became or becomes copyright matter:—

(a) before the Copyright Act, 1911, came into operation on July 1, 1912; or

(b) during the operation of the Copyright Act, 1911; or

(c) after the Copyright Act, 1956, comes into operation.

A work made before July 1, 1912, now enjoys copyright under the 1956 Act with the modifications of the general provisions of the Act that are in the Seventh Schedule of the Act, including Part VII of that Schedule. A work that became the subject-matter of copyright during the operation of the Copyright Act, 1911, now enjoys copyright under the 1956 Act with the modifications before referred to but excluding the said Part VII. The general provisions of the

Act apply to works coming into existence after the date on which the Act comes into operation.

Although the Copyright Act, 1911, has been repealed in the law of the United Kingdom, certain provisions thereof may continue to have effect for a time; thus, *e.g.*, the repealed provisions, as applied by Order in Council under section 29 of the 1911 Act in relation to foreign countries, continue, in the circumstances set out in Part VIII of the Seventh Schedule to the 1956 Act, to have effect notwithstanding the repeal until the occurrence of whichever of the following events first occurs:—

(a) the revocation of the Order in Council under the said section 29;

(b) the coming into operation of an Order in Council under section 32 of the 1956 Act;

(c) the expiration of a period of two years as defined in paragraph 40 of the Seventh Schedule to the 1956 Act—see Part VIII of the said Seventh Schedule.

**What copyright is**

The nature of "copyright" under the Act is explained in section 1 (1). The effect of this subsection read with subsection (4) is that "copyright" differs in its meaning according as it is used in relation to one or another of the various works or subject-matters in relation to which it can subsist. The various works and subject-matters in relation to which copyright can subsist under the Act are:—

> literary works, dramatic works, musical works, artistic works, sound recordings, cinematograph films, television broadcasts, sound broadcasts and published editions of works.

In relation to, *e.g.*, a literary work, copyright is therefore—see section 1 (1)—the exclusive right to do certain acts in relation to that literary work, namely, "the acts restricted by the copyright" therein. The acts restricted by the copyright in a literary work are specified in section 2 (5) of the Act. The acts restricted in relation to dramatic and musical works are the same. In relation to artistic works the "acts restricted" are specified in section 3 (5). As to the "acts restricted" in relation to the remaining subject-matters of copyright, namely sound recordings, films, television and sound broadcasts and published editions, see sections 12 (5), 13 (5), 14 (4) and 15 (3).

By providing that the meaning of copyright varies with the subject-matter in relation to which it subsists, the Act creates a

situation that is similar in some respects to that existing before the passing of the Copyright Act, 1911. Prior to that Act, the various sorts of works for which copyright could be claimed were the subjects of different copyright statutes, *e.g.*, copyright in books was provided for in the Copyright Act, 1842, in sculptures in the Sculpture Copyright Act, 1814, and in paintings in the Fine Arts Copyright Act, 1862 (*a*). The Copyright Act, 1911, altered this situation by establishing, in effect, one body of copyright law, including a comprehensive definition of copyright respecting all the works in which, under that Act, copyright could subsist. Accordingly "copyright" under the 1911 Act had the same meaning whether it was used in relation to a book, painting or a musical composition. This situation does not remain under the 1956 Act. The Act to some extent establishes separate codes of copyright in respect of the works and subject-matters referred to above. Thus while the principal rules of copyright as applied to literary, dramatic, musical and artistic works are in Part I of the Act, these rules as applied to films, broadcasts and sound recordings are in Part II.

**The conditions under which copyright may subsist**

The conditions under which copyright may subsist are specified:—

in section 2 as to literary, dramatic and musical works;
in section 3 as to artistic works;
in section 12 as to sound recordings;
in section 13 as to films;
in section 14 as to sound and television broadcasts; and
in section 15 as to published editions.

*Published and unpublished works*

Sections 2 and 3 preserve the distinction made in section 2 (1) of the Copyright Act, 1911, between published and unpublished works. If a literary, dramatic or musical work is original and unpublished, copyright subsists therein under the Act if the author was a qualified person at the time when the work was made: see sections 2 (1) and 49 (4), and as to artistic works, section 3 (2). When an original literary, dramatic, musical or artistic work has been published, copyright subsists therein under the Act if its first publication took place in the United Kingdom, or if the author was

(*a*) For a history of the English law of copyright, see *The Law of Copyright*, by T. E. Scrutton, 4th ed., 1903.

a "qualified person" when the work was first published: see sections 2 (2), 3 (3). "Qualified person" is a term defined in section 1 (5) of the Act to include British subjects and persons domiciled or resident in the United Kingdom. The Act defines "artistic work," "dramatic work," and "literary work"—see section 48 (1)—but not "musical work." Nor does the Act explain what is meant by "original" in sections 2 (1) and 3 (2). The word appeared in the 1911 Act. Its meaning in that context has been discussed. See, *e.g.*, *University of London Press, Ltd.* v. *University Tutorial Press, Ltd.* [1916] 2 Ch. 601, and Copinger on *Copyright*, 8th ed., Chap. 2. The Act does not define "publication" but explains its meaning for various purposes of the Act in section 49 (1) (2) (3).

*Sound recordings: records*

Copyright subsists in a sound recording if the maker of the recording was a qualified person at the time when the recording was made and, without prejudice to the foregoing, in a published sound recording if the first publication took place in the United Kingdom: see section 12 (1) (2). A "sound recording" is the aggregate of the sounds embodied in, and capable of being reproduced by means of, a record of any description other than a sound track associated with a cinematograph film; and "publication" in relation to a sound recording means the issue to the public of records embodying the recording: see section 12 (9). A sound recording is to be distinguished from a "record," defined in section 48 (1). A sound recording is an aggregate of sounds that can be reproduced, whereas a record is a material object such as a disc or tape which when put to use produces sounds. A sound recording is regarded as made at the time when the first record embodying the recording is produced, and the maker of the recording is the person who owns that record at the time when the recording is made: see section 12 (8). The Copyright Act, 1911, recognised copyright in records as defined therein but not in sound recordings.

*Cinematograph film*

Copyright subsists in a cinematograph film if the maker was a qualified person during the time when the film was made or if the film is first published in the United Kingdom: see section 13 (1) (2). The Act defines what a "cinematograph film" is, and also the terms "maker" and "publication" in relation to films: see section 13 (10).

*Broadcasts*

Copyright subsists—see section 14 (1)—in any television broadcast and in any sound broadcast made by the B.B.C. or the I.T.A. in the United Kingdom, save that a broadcast that is a repetition of a previous broadcast is subject to the special provisions of section 14 (3). A " television broadcast " means visual images broadcast by way of television *together* with any sounds broadcast for reception along with these images, and a " sound broadcast " means sounds broadcast otherwise than as part of a television broadcast: see section 14 (10).

" *Published editions* "

Copyright may now subsist in a " published edition " of a literary, dramatic or musical work. There was no such subject of copyright under the 1911 Act. The scheme is to protect the material form in which a work has been presented to the public although the work itself is not a copyright work. Accordingly, a publisher who has published books which conform to a particular typographical arrangement may now be entitled to a copyright in such arrangement as a " published edition." Copyright subsists in a published edition if the first publication of the edition took place in the United Kingdom or if the publisher thereof was a qualified person when the first publication took place: see section 15. The Act does not define the term " published edition." The word " publication " in relation thereto is to be construed in the light of section 49 (1) (2) (3).

**The term of copyright**

Copyright in a literary, dramatic or musical work continues to subsist until the end of fifty years from the end of the year in which the author died, although if the work is not, in the author's lifetime, published or performed in public or offered for sale on records or broadcast, copyright will continue to subsist until fifty years from the end of the year which includes the earliest occasion on which one of these four events took place: see section 2 (3). Under the 1911 Act the period of copyright in such works, and in artistic works, was the life of the author and fifty years from his death.

Copyright in an artistic work continues to subsist until the end of fifty years from the end of the year in which the author died, subject to two qualifications, namely—

(a) copyright continues to subsist in an unpublished engraving

until fifty years from the end of the year in which it is published; and

(b) the copyright in a photograph—which is an "artistic work," see section 3 (1)—continues to subsist until fifty years from the end of the year in which it is first published. Accordingly, in the case of photographs the lifetime of the maker of the photograph is not regarded: see section 3.

Copyright in a sound recording continues until the end of fifty years from the end of the year in which it is first published: see section 12 (3). The basic period for films is also fifty years but the period of the commencement of the term depends on whether or not the film is registrable under Part III of the Cinematograph Films Act, 1938, as amended: see section 13 (3). The term of copyright in a broadcast is fifty years from the end of the year in which it was made: see section 14 (2). The term of copyright in a "published edition" is twenty-five years from the end of the year in which it is first published.

**The rights comprised in copyright**

If copyright subsists in a literary, dramatic or musical work the work may not be reproduced, published, performed in public, broadcast, or transmitted on a diffusion service; nor may any adaptation thereof be made, nor may any such adaptation be reproduced, published, etc.: see section 2 (5). Furthermore, no "substantial part" of the work may be so dealt with: see section 49 (1). The words last quoted appeared in the 1911 Act—see section 1 (2) thereof—and were regarded in that context as related to quality rather than quantity. A very small extract from a work may be a substantial part thereof if it is a recognisable reproduction of a particular part of the work: see *Hawkes and Son, Ltd.* v. *Paramount Films, etc.* [1934] Ch. 593, and Copinger on *Copyright*, 8th ed., pp. 121 *et seq.*

The word "reproduced" before referred to has the meaning indicated in section 48 (1) of the Act. As already mentioned "publication" is to be read with section 49 (2) (3) in mind. While the Act defines what is meant by a performance—see section 48 (1)—it does not explain what is meant by a performance "in public," although the phrase has a meaning affected by sections 12 (7) and 14 (8) so far as sound recordings and television broadcasts are concerned. And see sections 40 and 48. Apart from these statutory provisions the phrase has no special meaning. Whether or not a performance takes place "in public" is a question of fact:

see *Harms* v. *Martan's Club, Ltd.* [1927] 1 Ch. 526, considering the phrase in section 1 (2) of the 1911 Act. The reference to broadcasting in section 2 (5) includes sound and television broadcasting, see section 48 (2), and the reference to a diffusion service is explained in section 48 (3). The provisions respecting the " adaptation " of literary dramatic and musical works are new, although the activities now involved in adapting were, to some extent, covered by section 1 (2) of the 1911 Act. Adaptation is defined in section 2 (6).

If copyright subsists in an artistic work, the work may not be reproduced, published, included in a television broadcast or transmitted on a diffusion service: see section 3 (5). The meanings of reproducing and publishing in this connection are the same as those indicated in the last paragraph.

If copyright subsists in a sound recording, no one may cause it to be heard in public, or broadcast it, or make a record of the recording, save that these acts may be done in relation to a sound recording if records embodying the recording have previously been issued to the public in the United Kingdom without labels specifying the year of the first publication of the recording: see section 12 (5) (6) and the proviso to subsection (6). If copyright subsists in a film, the film may not be copied, shown in public, broadcast or transmitted on a diffusion service: see section 13 (5). The acts restricted by the copyright in broadcasts are specified in section 14 (4). A television broadcast may not be filmed otherwise than for private purposes, nor may it be shown to the public if it is to be seen or heard by a paying audience. And see sections 40 and 48. Sounds broadcast, whether in the course of a sound broadcast or a television broadcast, may not be recorded otherwise than for private purposes. Neither a television nor a sound broadcast may be rebroadcast. The phrase " otherwise than for private purposes " is explained in section 14 (7), and the circumstances in which a television broadcast is seen or heard by a paying audience in section 14 (8). If copyright subsists in a published edition the typographical arrangement of the edition may not be reproduced (s. 15 (3) ), save to the extent indicated in section 15 (4).

### The ownership of copyright

The ownership of copyright is dealt with in section 4 as to literary, dramatic, musical and artistic works; in section 12 (4) as to sound recordings; in section 13 (4) as to films; in section 14 (2)

as to broadcasts; and in section 15 (2) as to published editions. Section 4 provides for the "author" owning the copyright in a literary, dramatic, musical or artistic work. The corresponding section in the 1911 Act was section 5. The Act does not define "author" in this context and the 1911 Act contained no definition of the word. The question who is the author of a work sometimes gives rise to difficulties: see *Tate* v. *Thomas* [1921] 1 Ch. 503 (copyright in a revue); *Donoghue* v. *Allied Newspapers* [1938] Ch. 106 (article written on information supplied) and *Springfield* v. *Thame* (1903) 89 L.T. 242 ("edited" manuscript). There is not necessarily one author of a work. A work may be a work of joint authorship, *i.e.*, a work produced by the collaboration of two or more authors in which the contribution of each author is not separate from the contribution of the other author or authors: see section 11 (3). Such works are subject to the special rules set out in the Third Schedule to the Act. The Act also contains special rules respecting anonymous and pseudonymous works: see section 11 (1) and Second Schedule.

Section 49 (5) provides that the term "owner of the copyright" may be used in reference to a person who is not entitled to the entirety of the copyright in a work. Different persons may have different rights in relation to a work, *e.g.*, A may be entitled to perform a dramatic work and B may be entitled to publish it in book form. In this situation A is by virtue of section 49 (5) the "owner of the copyright" if any question arises as to the infringement of copyright in the work by a wrongful performance thereof.

In the case of sound recordings and films the owner of the copyright therein is the maker thereof: see sections 12 (4) and 14 (4). The word "maker" is defined in relation to each of these subjects: see sections 12 (8) and 13 (10). The B.B.C. and the I.T.A. own the copyrights in the broadcasts which they make: see section 14. The publisher of a published edition owns the copyright therein: see section 15 (2).

To the general provisions set out above there are certain exceptions respecting literary, dramatic, musical and artistic works in subsections (2) (3) and (4) of section 4. These subsections lay down special rules respecting the ownership of copyright in works done for newspapers, in photographs, portraits and engravings and in works done in the course of contracts of employment. The Act recognises not only actual but prospective ownership of copyright: see section 37, to which there is no corresponding provision in the 1911 Act.

**Assignments and licences**

Section 36 of the Act provides that copyright is transferable by assignment, testamentary disposition or by operation of law as personal or movable property. This provision replaces subsection (2) of section 5 of the 1911 Act without the proviso to that subsection. An assignment of copyright, whether total or partial, must be in writing signed by the assignor: see section 36 (3). A person to whom copyright has been partially assigned (as to which see section 36 (2)) may be the "owner of the copyright" for certain purposes of the Act: see section 49 (5). The buying of a work does not transfer the copyright therein to the buyer. Thus, if A buys a painting, he does not acquire the right to reproduce it: see, *e.g.*, *Cooper* v. *Stephens* [1895] 1 Ch. 567. But the bequest of an unpublished work carries with it the copyright in the work: see section 38, a provision that did not appear in the 1911 Act. Although an assignment must be by signed writing, it need not be in any particular form; and it seems that an oral assignment will protect an assignee from an infringement claim by the assignor and may be treated as an equitable assignment: see *Ward, Lock & Co.* v. *King* [1906] 2 Ch. 550.

Special provisions respecting the assignment of certain rights comprised in the copyright in television broadcasts are in the Fifth Schedule to the Act: see section 37 (4).

The Act recognises that the owner of copyright may not only wholly or partially assign his copyright but may also grant licences in respect thereof. The Act refers to "licences" and "exclusive licences." A licence is not defined (save for the special purposes of Part IV, see section 24), but section 19 (9) enacts that in that section "exclusive licence" means a licence in writing, signed by or on behalf of an owner or prospective owner of copyright, authorising the licensee, to the exclusion of all other persons, including the grantor of the licence, to exercise a right which by virtue of this Act would (apart from the licence) be exercisable exclusively by the owner of the copyright. A licence binds persons who acquire (*e.g.*, by assignment) the ownership of the copyright, save that a purchaser thereof for value in good faith without notice takes free of the licensee's rights: see section 36 (4) and see section 49 (7). Section 5 (2) of the 1911 Act provided for the granting of an "interest in the right by licence" but a licence appears to give rise to no proprietary rights under this Act. Proprietary rights arise from assignments, not from licences. A licence amounts to a consent, *i.e.*, a consent to do acts which the owner of the copyright has the exclusive right to do. The Act permits of "future

copyright "—defined in section 37 (5)—being assigned wholly or partially: see section 37.

**Infringement generally and by importation, sale or other dealings**

The Act provides (s. 1 (2)) that copyright in a work is infringed when a person does one or more of the acts which, in relation to that work, are the restricted acts: see, *e.g.*, as to literary works, section 2 (5) and as to sound recordings section 12 (5). In addition to general infringements of that nature the Act makes certain other activities in relation to a work to be infringements of the copyright therein. Corresponding provisions were in section 2 (2) of the 1911 Act. The activities referred to are specified in section 5 as to literary, dramatic, musical and artistic works and in section 16 as to recordings, films, broadcasts and published editions. Thus, copyright in a literary, dramatic, musical or artistic work is infringed—

(a) by importing articles into the United Kingdom (otherwise than for private and domestic use) which could only be made in the United Kingdom by infringing copyright in the work; and

(b) by selling, letting for hire, or by way of trade, exposing for sale or hire, or exhibiting in public, articles made in infringement of copyright. See, more particularly, section 5 (3) (4). Copyright in a literary, dramatic, musical or artistic work is also infringed by a person who permits a place of public entertainment to be used for a performance in public of the work, where the performance constitutes an infringement of the copyright in the work, save in the circumstances mentioned in the proviso to section 5 (5).

**Exceptions from the protection of works**

The Act provides that certain activities are not to constitute infringements of copyright although otherwise they would be so by virtue either of section 1 (2) or section 5 or section 16 of the Act.

*Fair dealing, etc.*

Section 6 preserves the rule in section 2 (1) (i) of the 1911 Act that "fair dealing" with a literary, dramatic or musical work for purposes of research or private study is no infringement of copyright. Section 6 authorises other fair dealings with such works, see subsections (2) (3). "Fair dealing" with a literary, musical or dramatic work is not an infringement of the copyright therein if done for purposes of criticism or review, whether of that work or

of another work. And " fair dealing " with a literary, dramatic or musical work is no infringement of copyright if done for the purposes of reporting current events in a periodical, broadcast or film. Subsections (2) and (3) afford protection, however, only if accompanied by a " sufficient acknowledgment," a phrase defined in section 6 (10). Subsections (5) and (6) of section 6 correspond to section 2 (1) (iv) and (vi) of the 1911 Act. Subsection (5) permits of acknowledged readings or recitations being made in public from published literary or dramatic works but the reading or reciting may not be broadcast. Subsection (6) allows of short passages from published literary or dramatic works being in the circumstances there specified, included in collections intended for use in schools.

*Recording before broadcasting*

Section 6 (7) is a new provision designed to enable a work to be recorded before it is broadcast. As a result of this subsection the B.B.C. can transmit a recorded programme instead of a " live programme " although it has no more than a right to broadcast the work in question, *i.e.*, has, apart from the section, no right to record the work. The subsection is of use only during the limited period indicated therein.

*Libraries*

Section 7 provides for the making and supplying of copies of works in certain libraries. The libraries affected will be prescribed by regulations made by the Board of Trade. No such regulations have yet been made. The librarian of a prescribed library may make and supply a single copy of an article in a periodical publication to a person requiring the same for study or research. Furthermore, under section 7 (3) a prescribed librarian may for the same purposes, *i.e.*, study or research, make and supply copies of parts of literary, dramatic or musical works (other than an article in a periodical publication) under the conditions there specified, if the librarian does not know and could not by reasonable inquiry ascertain the name and address of the owner of the copyright in the work. Prescribed librarians are also enabled to supply each other with copies of copyright works in the circumstances explained in subsection (5).

*Archives*

Subsections (6) and (7) of section 7 authorise the reproduction for study purposes and subsequent publication of old unpublished works kept in public institutions. Unpublished literary, dramatic or musical works in which copyright subsists but which were made

over 100 years ago, may be reproduced for study or research with a view to publication if the manuscript or a copy of the work is kept in an institution open to the public, if the author of the work in question has been dead for fifty years or more. The circumstances in which the work reproduced by virtue of this section may then be published are set out in subsection (7). And see subsection (8) as to broadcasts based on reproductions made by virtue of subsection (6).

*Records of musical works*

Section 8 contains certain exceptions from the protection of records of musical works. To make a record of a musical work is to "reproduce" it—see section 48 (1)—and accordingly to infringe the copyright therein: see section 2 (5). Section 8 qualifies this situation. Subject to its provisions records of a musical work may be made for trading purposes if records of the work have already been lawfully made for such purposes. There were corresponding but distinguishable provisions in section 19 (2)–(8) of the 1911 Act. Section 8 does not in any circumstances authorise the making of a record of a record, only of a musical work. The circumstances in which a record of a *recording* may be made are governed by section 12 of the Act.

*Artistic works*

Section 9 is concerned with exceptions from the protection of artistic works only and in subsections (1) and (2) sets out the "fair dealing" rules now applicable to artistic works.

Subsections (3) and (4) enable sculptures in public places and works of architecture to be photographed or otherwise reproduced: see formerly 1911 Act, s. 2 (1) (iii).

A three dimensional article such as a doll may be a reproduction of a drawing which shows the figure forming the design of the article and as such an infringement of copyright. See, *e.g.*, *King Features, etc.* v. *O. & M. Kleeman, Ltd.* [1941] A.C. 417. The effect of this decision is modified by section 9 (8) since now the making of an object of any description which is in three dimensions shall not be taken to infringe the copyright in an artistic work in two dimensions if the object would not appear, to persons who are not experts in relation to objects of that description, to be a reproduction of the artistic work.

Section 9 (10) (a new provision) enables a building in which copyright subsists as an artistic work—see section 3 (1) (b)—to be rebuilt although the owner of the building may not own the copyright therein.

**Remedies for infringement of copyright**

The remedies for the infringement of copyright in Part III of the Act are generally the same as those in sections 6–14 of the 1911 Act, but there are important differences in the two Acts, *e.g.*, (a) the special period of limitation in section 10 of the 1911 Act is abolished; consequently, the Limitation Act, 1939, regulates actions for infringement of copyright so far as questions of limitation are concerned; and (b) the court may now award exemplary damages for infringement of copyright in the circumstances set out in section 17 (3). Part III affords the remedies for infringement whether the copyright matter in question is Part I matter, *i.e.*, literary, dramatic, musical or artistic work or Part II matter, *i.e.*, a record, film, broadcast or published edition. Infringement of copyright is to be regarded as infringement of a proprietary right with the consequence that damages, an injunction, or an account may be claimed in respect of such infringement (see s. 17 (1)). An innocent infringer may, however, be relieved of having to pay damages in the circumstances set out in section 17 (2). The measure of damages for infringement of copyright in a literary work was considered in *Sutherland Publishing Co.* v. *Caxton Publishing Co.* [1936] Ch. 323. Damages for infringement of copyright is cumulative with damages that may be awarded for conversion under section 18 (1911 Act, s. 7). See same case [1939] A.C. 178. Damages for conversion may not now be awarded against an innocent infringer of copyright: see section 18 (2). Whether this was the position under the 1911 Act was uncertain. Section 19 relating to infringement proceedings in the case of a copyright that is subject to an exclusive licence—defined in section 19 (9)—is new.

Section 20 of the Act facilitates the proof of certain facts in copyright actions. In doing so it extends the provisions of section 6 (3) of the 1911 Act. Subsection (1) provides that copyright is presumed to exist in a work unless the fact is put in issue and that a person claiming to be an owner of copyright is to be deemed such owner unless the fact is put in issue. Subsection (2) provides that a person whose name appears on a work as the author is to be presumed to be the author thereof and the work is to be presumed not made pursuant to a contract of employment or otherwise in the circumstances set out in section 4 (2) (3) (4). Subsections (5) and (6) of section 20 are new, providing for presumptions as to the originality of works and as to first publications in the case of works by deceased persons and of works that are pseudonymous or anonymous.

The Act creates a number of summary offences, as did the 1911 Act: see section 21; *cf.* the 1911 Act, s. 11. The offences may arise in respect either of Part I works, *i.e.*, literary, dramatic, musical or artistic works or Part II subject-matter, *i.e.*, films, recordings, broadcasts, etc.: see subsection (4). The offences consist in brief, in the United Kingdom, in making, selling, distributing or importing "infringing copies"—see section 18 (3)—of works in which copyright subsists; or causing a literary, dramatic or musical work to be performed in public knowing that copyright subsists in the work and that the performance constitutes an infringement of copyright. The offences are punishable by varying fines as to first offences and by imprisonment as to other offences. Section 22 enables an owner of the copyright in any published literary, dramatic or musical work to take steps to prevent copies thereof from being imported by giving an appropriate notice to the Commissioners of Customs and Excise. The corresponding provision in the 1911 Act was section 14.

**Performing Right Tribunal**

Part IV of the Act establishes the Performing Right Tribunal with a jurisdiction to determine disputes between "licensing bodies"—see section 24 (3)—and persons who wish to perform in public or to broadcast certain copyright work. The constitution of the Tribunal and the rules as to procedure in proceedings before it are provided for in section 24 and the Fourth Schedule. The Tribunal has no jurisdiction respecting artistic works, films or sound broadcasts. It is concerned only with literary, dramatic and musical works, sound recordings and television broadcasts, and not with the entirety of the copyright in those works. The Tribunal is concerned with licences (a) to perform literary, dramatic or musical works in public, or to broadcast such works, or adaptations thereof, or to transmit such works or adaptations thereof on a diffusion service; (b) to broadcast sound recordings or to cause them to be heard in public; and (c) to cause television broadcasts to be seen or heard in public. Licences of these kinds may be the subject of "references" and "applications" to the Tribunal. "References"—see sections 25 and 26—seek to have existing licence schemes confirmed or varied. "Applications"—see section 27—seek to have particular licences granted both in the case when there is a relevant licence scheme in existence and when there is not.

The Act first provides, in section 25, that a "licence scheme" may be referred to the Tribunal either by such an organisation as is referred to in section 25 (1) (a) or by a private individual when there is a dispute as to such a scheme between the organisation or

individual and the licensing body operating the scheme. The licensing body may not refer its scheme to the Tribunal: *cf.* sections 26, 27. A "licence scheme" means a scheme made by a licensing body setting out the classes of cases in which the body or the persons on whose behalf it acts is willing to grant licences in respect of copyright works and the charges, terms and conditions subject to which licences will be granted in respect of such works. Thus, a society owning the copyright in musical works can by a licence scheme lay down the charges, terms and conditions on which a person wishing to perform these works can acquire the right to do so. "Licensing body" has the varying meanings set out in section 24 (3) but in effect includes such bodies as the Performing Right Society, Phonographic Performances, Ltd., and, as to television broadcasts, the B.B.C. and the I.T.A. See also Fifth Schedule. The Tribunal may, on such a reference, confirm or vary the licence scheme that is in dispute and accordingly may presumably vary the terms and conditions (see s. 24 (4)) and the charges subject to which the licensing body has hitherto been prepared to grant licences in respect of the works in the licence scheme concerned. Thus, if a particular organisation controls the performing rights in certain musical works and a person who wishes to perform such works in public is dissatisfied with the terms on which the organisation is ready to allow public performances of the works, that person may refer the organisation's scheme to the Tribunal under section 25, to be confirmed or varied by the Tribunal. References under section 26 follow after orders made under section 25. Once an order has been made under section 25, section 26 enables the Tribunal to reconsider the scheme to which it relates pursuant to a reference to it by a person or organisation requiring a licence but objecting to the scheme or by the licensing body—the licensing body being entitled to refer a scheme under section 26 but not under section 25.

Application under section 27 may be made by (i) a person claiming, in a case covered by a licence scheme, that the licensing body concerned has refused or failed to grant him a licence in accordance with the provisions of the scheme and (ii) a person claiming that he requires a licence in a case not covered by a licence scheme and either (a) a licensing body has refused or failed to grant the licence and that in such circumstances it is unreasonable that a licence should not be granted or (b) that any charges terms or conditions subject to which a licensing body propose that the licence should be granted are unreasonable. Section 27 does not mean that a person owning the copyright in, *e.g.*, a musical work can be compelled to allow it to be publicly performed. An

application can only be made when the attitude of a licensing body is complained of. So if A owns the copyright in some music and refuses to allow B to perform it in public, B cannot complain of that to the Tribunal because section 27 contemplates that a "licensing body"—see section 24 (3)—shall have refused or failed to grant a licence, or have allegedly acted unreasonably before any application can be made to it. The effect of section 27 therefore appears to be that a person may apply thereunder when a licensing body as defined in section 24 (3), being able to grant or procure a licence in some work or works (which may or may not be covered by a scheme), either refuses a licence to that particular person or grants a licence on unreasonable terms.

The way in which effect is given to any order that the Tribunal may make under sections 25, 26 or 27 is explained in section 29. In effect a person who in performing or broadcasting a work referred to in an Order under sections 25, 26 or 27 complies with the provisions of any such Order will not be regarded as infringing any copyright in that work. More particularly when an Order has been made on a "reference," a person who does anything which would not be an infringement of copyright if he were the holder of a licence granted in accordance with the provisions of the Order is to be regarded as the holder of such a licence if he complies with the requirements of section 29 (2). These are (a) that at all material times he comply with the terms and conditions which in accordance with the licence scheme as confirmed or varied by the order would be applicable to a licence covering the case in question and (b) if, in accordance with the scheme as so confirmed or varied, any charges are payable in respect of such licence, that at the material times he pays these charges to the licensing body operating the scheme, or if at that time the amount payable could not be ascertained, he gives an appropriate undertaking to pay: see section 27 (2). There is a corresponding provision respecting the effect of an order made on an application: see section 27 (3).

Questions of law arising in the course of proceedings before the Tribunal may be referred to the High Court or the Court of Session: see section 30.

References under sections 25 and 26 relating to licences to transmit works on a diffusion service are subject to the provisions of section 28 when the licences relate to (i) programmes broadcast from a place outside the U.K. and otherwise than by the B.B.C. or I.T.A. and (ii) payments are made in respect of such programmes in the country in which the broadcast is made. In such circumstances the Tribunal may take into account the matters specified in section 28 when fixing the charges payable for such

licences. In the exercise of its jurisdiction relating to television broadcasts the Tribunal is to have regard to any conditions imposed by the promoters of any entertainment or other event which is to be comprised in such broadcasts and in particular the Tribunal is not to hold a refusal or failure to grant a licence to be unreasonable if it could not have been granted consistently with those conditions, although the Tribunal is not required to have regard to such conditions in so far as they purport to regulate the charges to be imposed in respect of the grant of licences or in so far as they relate to payments to be made to the promoters of any event in consideration of the grant of facilities for broadcasting: see section 29 (4).

Section 29 (5) enables the Tribunal to reduce the licence fees payable in respect of the playing of sound recordings or the showing of television broadcasts by the charitable and other bodies specified in section 12 (7) (b) or to exempt such bodies altogether from the payment of such fees.

**Extension or restriction of operation of the Act**

*United Kingdom, Isle of Man, Channel Isles, colonies and dependencies*

The Act extends to England, Wales, Scotland and Northern Ireland (see s. 51 (3)). Her Majesty may by Order in Council direct that any of the provisions of the Act shall extend to the Isle of Man, the Channel Islands, any colony and any country outside Her Majesty's dominions in which for the time being Her Majesty has jurisdiction: see section 31. The legislatures of any of the foregoing may, within the limited scope defined in section 31 (3), modify or add to the provisions of the Act as extended to them. The 1911 Act proceeded on a different course. It extended throughout Her Majesty's dominions, save in so far as the Act indicated otherwise: see 1911 Act, s. 25. The Act of 1911 then provided that it should not extend to a self-governing dominion unless adopted by that dominion and that whilst it extended to the remaining dominions and possessions of the Crown, local legislatures were given certain powers to modify the Act as it applied locally. The self-governing dominions all either adopted the Act or passed Acts of their own to the same effect as the 1911 Act. In the result there was under the 1911 Act a generally uniform system of copyright law throughout the Commonwealth and Empire. The repeal of the 1911 Act and the fact that the 1956 Act extends over the limited area specified above, means that there will be no Imperial statute in force in many countries to which the 1911 Act has hitherto extended. The operation of the 1911 Act is not, however, withdrawn immediately in these countries. The transitional

provisions of the Act—see Seventh Schedule, Part VIII—provide for the 1911 Act remaining in force in these countries pending the coming into operation of the scheme of the 1956 Act respecting countries other than the United Kingdom.

*Application of Act to other countries*

The scheme of the Act respecting countries other than those to which the Act extends or to which it may be extended under section 31 depends on section 32. That section provides that Her Majesty may by Order in Council " apply " the Act in the case of countries to which it does not extend. Under this section the Act may therefore be " applied " in respect both of foreign countries and countries of the Commonwealth and Empire. The effect of the " application " of the Act—in its entirety—to a country, *e.g.*, France, is that French works and French nationals or residents receive the same copyright protection in the United Kingdom as do British works and British nationals or residents. The Act does not, however, contemplate that it will always be applied in its entirety, *e.g.*, an Order in Council may provide for the application of the Act in relation to works first published in a foreign, Commonwealth or Empire country: see section 34 (1) (a), or to some classes of such works: section 32 (2) (b), or in relation to foreign nationals: section 32 (1) (b). It is by use of this section that practical effect may be given to the undertakings of the United Kingdom to give effect to the provisions of the various International Copyright Conventions including the Brussels Convention of 1948 and the Universal (Unesco) Copyright Convention.

The scheme of " applying " the U.K. copyright law in respect of foreign works or nationals was used in the 1911 Act: see section 29 of that Act. The principal Order made under that section was the Copyright (Rome Convention) Order, 1933, dated March 16, 1933, whereby the 1911 Act was applied to all countries of the Copyright Union. As in the case of colonies, etc., referred to above, the 1911 Act continues in effect, notwithstanding its repeal as part of the law of the United Kingdom, in so far as it has been applied under section 29 of the 1911 Act in relation to a foreign country, for the limited period of time indicated in Part VIII of the Seventh Schedule of the 1956 Act.

*Application to international organisations, broadcasters other than the B.B.C. and I.T.A.: Denial of copyright to citizens of countries not giving adequate protection to British works*

Section 33 enables the Act to be applied in relation to international organisations such as UNO so that such organisations will

in certain circumstances be entitled to United Kingdom copyright in works that are produced under the direction and control of such organisations. The provisions of the Act relating to broadcasts by the B.B.C. and the I.T.A. may by Order in Council be applied (subject to such exceptions and modifications as may be specified in the Order) in relation to broadcasts by persons or classes of persons other than the B.B.C. and I.T.A.: see section 34. Section 35 of the Act is to the same general effect as section 23 of the 1911 Act and concerns publications by nationals of countries which do not give adequate protection to "British works" (see s. 35 (5)). In such circumstances Her Majesty may by Order in Council provide that copyright is not to subsist in works first published after the date specified in the Order if at the time of first publication the authors thereof were nationals of the designated country and not domiciled or resident in the United Kingdom or bodies incorporated under the laws of the designated country.

**Industrial designs: Amendments to the Registered Designs Act, 1949**

The 1911 Act recognised that some artistic works might also be "designs" entitled to the protection of the Patents and Designs Act, 1907. In an effort to provide that a work should not be entitled to the protection of the two Acts, section 22 of the 1911 Act provided:—

> "(1) This Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process.
>
> "(2) General rules under section eighty-six of the Patents and Designs Act, 1907, may be made for determining the conditions under which a design shall be deemed to be used for such purposes as aforesaid."

This section did not satisfactorily classify works as either artistic works protected by the Copyright Act, 1911, or as industrial designs protected by the Patents and Designs Act, 1907. The difficulties that arose are considered in the Report of the Copyright Committee, 1952, Cmd. 8662. Section 10 of the Act of 1956 makes another attempt to specify when a work is to be protected as an artistic work under this Act and when as a "design" under the Registered Designs Act, 1949. Section 10 distinguishes between designs registered under the 1949 Act and designs not so registered. When a registered design corresponds (see s. 10 (7)) with an artistic work in which copyright subsists, it is not an infringement of the

copyright in the artistic work (a) *during the time that the design is protected by the 1949 Act*, to do anything that is within the scope of the copyright of the design, *i.e.*, to do anything which the registered proprietor of the design has the exclusive right to do by virtue of section 7 of the 1949 Act: see section 10 (6); or (b) *after the time referred to in* (a), to do anything which, if it had been done during the time referred to in (a), would have been within the scope of that copyright (see (a) above) as extended to all associated designs and articles, *i.e.*, to do anything which by virtue of section 7 of the 1949 Act the registered proprietor would have had the exclusive right to do if—

> " (a) when that design was registered, there had at the same time been registered every possible design consisting of that design with modifications or variations not sufficient to alter the character or substantially to affect the identity thereof, and the said proprietor had been registered as the proprietor of every such design, and
>
> " (b) the design in question, and every other design such as is mentioned in the preceding paragraph, had been registered in respect of all the articles to which it was capable of being applied ": see section 10 (6).

Section 10 (1) takes effect subject to the provisions of the First Schedule to the Act which is concerned with the situation which arises when the registration of a design under the 1949 Act has been effected otherwise than by the proprietor of the design and without his knowledge. Section 10 goes on to deal with artistic works in which copyright subsists which are, with the consent of the copyright owner, used as industrial designs but are not registered as such under the Registered Designs Act, 1949: see section 10 (2) (3) (4). These subsections provide that the copyright in such works is not infringed (a) during a defined (see subs. (3) ) period of fifteen years, by doing anything which, at the time when it is done, would have been within the scope of the copyright in the design if the design had, immediately before that time, been registered in respect of all " relevant " articles (see subs. (3) ); or (b) after that period, by doing anything which, at the like time, would, if the design had been so registered, have been within the scope of the copyright in the design as extended to all associated designs and articles.

The Act amends sections 6, 8 and 11 of the Registered Designs Act, 1949: see section 44. A design is registrable under the 1949 Act if it is " new or original." Section 6 of the 1949 Act provides that the disclosure of a design in certain circumstances is not to mean that the design is otherwise than " new or original."

Section 44 (1) of the 1956 Act extends this provision. The amendment to section 8 of the 1949 Act provides that a registration made possible by the amendment to section 6 of the 1949 Act shall confer the protection of the Registered Designs Act, 1949, on the design during the period of the protection afforded by the 1949 Act to the work as a registered design or the period of copyright protection afforded by the 1956 Act to the work as an artistic work, *whichever is the shorter*. If the copyright in an artistic work expires while a design registered by virtue of section 6 (4) of the 1949 Act still enjoys protection under the 1949 Act, the amendment to section 11 of the 1949 Act enables an application for cancellation of the registration to be made.

**Amendments to the Dramatic and Musical Performers' Protection Act, 1925**

Section 45 adds four new sections to and otherwise amends the Dramatic and Musical Performers' Protection Act, 1925: see 1956 Act, Sixth Schedule. It is an offence under section 1 of the Dramatic and Musical Performers' Protection Act, 1925 (except in the circumstances there mentioned) to make any record of a performance of any dramatic or musical work without the consent in writing of the performers, or to sell, or to perform in public, any record made without such consent. By virtue of section 45 of the 1956 Act it is now an offence under the 1925 Act without the consent in writing of the performers (a) to make or use a film, or (b) to broadcast a dramatic or musical work, otherwise than by use of a record or film. The amendments to the 1925 Act also introduce certain new defences to proceedings under the 1925 Act, whether such proceedings are in respect of old or new offences under the 1925 Act. It is a defence to proceedings under the Act to prove that the record, film or broadcast was made for the purpose of reporting current events, or that the inclusion of the performance in question in the record film or broadcast was only by way of background or was otherwise incidental to the principal matters comprised or represented in the record, film or broadcast. The Act introduces a new section 3B to the 1925 Act whereby the consents of all performers concerned in the making of a film, broadcast or record can be given by one authorised person. In the 1925 Act " record " means " any record or similar contrivance for reproducing sound "; *cf.* " record " as defined in section 48 (1) of this Act.

**Crown copyright**

Section 39 provides for the Crown becoming, in the circumstances there specified, entitled to copyright in literary, dramatic,

musical and artistic works, films and sound recordings which are made or published by or under the direction of Her Majesty or a Government Department.

**Broadcasts of sound recordings and cinematograph films, and diffusion of broadcast programmes**

Causing a sound recording to be heard in public infringes any copyright that subsists therein under section 12 of the Act: see section 12 (5). But section 40 (1) provides that there is no infringing of the copyright in a sound recording if a person causes it to be heard in public by the reception of a broadcast by the B.B.C. or the I.T.A. There are similar provisions respecting films that are broadcast, and films and other works transmitted on a diffusion service. A person who causes a film to be seen or heard in public by the reception of an authorised broadcast (see s. 40 (5)) is, in proceedings for the infringement of copyright in the film under section 13, to be regarded as the holder of a licence to cause the film to be seen or heard in public by the reception of the broadcast: see section 40 (2). A person who causes a programme comprising a literary, dramatic or musical work, or an adaptation of such a work, or an artistic work, or a film, to be transmitted on a diffusion service is, in infringement proceedings, to be regarded as the holder of a licence to include the work or film in question in the programme, if the programme transmitted has been received from an authorised broadcast of the B.B.C. or I.T.A.: see section 40 (3) and also subsection (4). And see section 48 (5) (6).

**Education**

As already mentioned, section 6 (6) of the Act, replacing section 2 (1) (iv) of the 1911 Act, enables extracts from copyright works to be included in collections intended for use in schools, if suitably acknowledged. Section 41 further reduces, in the interest of education, the copyright protection given by the Act. A literary, dramatic or musical work may be reproduced (a) otherwise than by the use of a duplicating process (see s. 41 (6)), in the course of instruction, whether at a school or elsewhere, or (b) in examination questions and answers, whether or not copyright subsists in such work. And a performance in a school of a literary, dramatic or musical work, or of a film, recording or broadcast is not to be regarded as a performance in public: see section 40 (3) (4) (5).

**False attribution of authorship**

The use of a person's name, without that person's consent, is actionable under section 43, in the circumstances there specified,

as a breach of statutory duty for which damages are recoverable: see section 43 (8) (9). The section is concerned with literary, dramatic, musical and artistic works only, *i.e.*, it has no application in relation to recordings, films and broadcasts. "Name" includes initials or a monogram: see subsection (11). An action lies under this section when a person, without consent, (i) displays another's name on a work of which that other is not the author in such a way as to imply that that other is the author of the work, or engages in the activities akin to this that are specified in section 43 (2) (a) (b) and (c), or (ii) performs in public or broadcasts a work as being the work of another when the work is, to the knowledge of that person, not the work of that other. The alteration of an artistic work after the author has parted with possession thereof becomes actionable in the circumstances specified in subsection (4). And see subsection (6).

Action may be brought under section 43 not only by a person whose name is misused or whose work is altered, but also by the personal representatives of a deceased person but only in respect of things done within twenty years of the death. Apart from proceedings under this section misuse of a name may be grounds for a claim in a passing-off action: see, *e.g.*, *Samuelson* v. *Producers, etc., Ltd.* [1932] 1 Ch. 201.

**Breach of confidence**

Section 46 (4) provides that nothing in the Act is to affect the operation of any rule of equity relating to breaches of trust or confidence. There was a similar provision in the 1911 Act: see 1911 Act, s. 31.

Accordingly the general law relating to disclosure of confidential information is preserved. A person in possession of confidential information can, in appropriate circumstances, be restrained from disclosing it, whether or not he obtained the information pursuant to a contract and whether or not copyright subsists in such information: see, *e.g.*, *Prince Albert* v. *Strange* (1849) 1 H. & T. 1; *Exchange Telegraph Co., Ltd.* v. *Gregory* [1896] 1 Q.B. 147; *Saltman Engineering Co., Ltd.* v. *Campbell, etc.* (1948) 65 R.P.C. 203.

**Interpretation and transitional provisions**

The Act uses some ordinary words in a special sense: see, *e.g.*, adaptation, drawing, engraving, performance, reproduction, defined in section 48 (1); and when questions involving broadcasting and diffusion services arise the provisions of section 48 (2)–(6) may have to be taken into account. Section 49 explains the meaning of

" publication " in the Act and (subs. (5)) how the " owner of the copyright " may be a person not entitled to the entirety of the copyright in a work but a person entitled to do some but not all of the acts restricted by the copyright in the work.

The particular importance of the transitional provisions of the Act is referred to in the opening paragraphs of this article.

# THE DRAFTING OF MEDICAL PARTNERSHIPS

By E. H. Bodkin, Barrister-at-Law

The drafting of medical partnerships where one or more of the partners has joined the National Health Service involves consideration of a number of special points, that of the greatest importance being the avoidance of any possibility of the deed involving the partners in liability under section 35 of the National Health Service Act, 1946, for the offence of a sale of goodwill. A precedent of such a partnership, where the continuing partner only has joined the National Health Service, drafted by the writer, was published in the *Conveyancer*, Vol. 20, at p. 753. It may be of some assistance to those drafting such partnerships to set out the more important points to be considered.

The National Health Service (Amendment) Act was passed in 1949 to give effect to the Report of the Legal Committee on Medical Partnerships (Cmd. 7565). Consolidated Regulations (National Health Service (General Medical and Pharmaceutical Services) Regulations, 1954, S.I. 1954, No. 669, hereinafter referred to as "the General Regulations") are now in force, and have been recently slightly amended by the National Health Service (General Medical and Pharmaceutical Services) Amendment Regulations, 1956, S.I. 1956, No. 1076. It may now be assumed that the Service has reached its final form, and is not likely to be greatly altered. It has, however, been the practice to insert in medical partnerships a very wide arbitration clause, under which the provisions of the partnership may be varied, or the partnership dissolved on terms, if this is equitable having regard to any change in the Acts or Regulations. Most doctors will probably feel safer if such a clause is still introduced. A power to refer existing partnerships to arbitration is to be read into partnerships subsisting on the appointed day by section 7 of the Amendment Act.

The Amendment Act of 1949 was mainly concerned with adapting the provisions of existing partnerships to the new law; but it contains two provisions affecting new partnerships. The first, which was designed to remove doubts which had been raised as to the effect of the prohibition of the sale of goodwill, makes it clear that it is lawful for a partner who is outside the Service to sell goodwill which he has acquired from a practitioner in the Service. The

second is concerned with options to purchase or obligations to purchase the share of a partner who is in the Service, where a new partnership agreement has been made, superseding or varying a partnership existing on July 5, 1948, and the practice is continued, whether or not with the introduction of a new partner. The result of sections 1 (5) and 2 is that, if the new partnership provides for an option or obligation to purchase on substantially the same terms as that under the existing partnership, and at least two of the old partners remain, on the purchase of the share by one of the original parties to the option or obligation, the partner selling the share will be entitled to have the compensation for loss of the right to sell his share which is provided for by the Amendment Act, assessed and paid at once, as if the new partnership had existed on July 5, 1948. This will be plainer from an example. Thus, suppose A and B were in partnership and in the Service on July 5, 1948, and B had an option to purchase A's share. C is now taken into the partnership, and B is given an option to purchase A's share. It will be an advantage to A to make the terms of the option similar to the existing option (except of course as to payment for goodwill, which would be illegal), so that he can obtain compensation at once on exercise of the option for his inability to charge for his share of goodwill.

### Sale of Goodwill

The prohibition against sale of goodwill is in very wide terms. It covers premiums paid by a new partner, payment for goodwill on a dissolution, and payments to the personal representative of a partner. Even a provision for payment on dissolution of an annuity to another partner's widow might be a sale of goodwill in some cases: see section 35 (8). The performance of services by a partner for a consideration less than his services might reasonably have been considered to be worth would be a sale, and also services by an assistant who is intended ultimately to succeed to a share in the partnership. Further, the sale or letting of surgeries may in certain cases be a sale of goodwill.

As regards the performance of services by a new partner, the result of section 35 of the National Health Service Act, 1946, is that he must, if he is in the Service, receive a share of profits commensurate with the market value of his services from time to time. It is now usual (and in fact necessary) to provide for a junior partner to have the option of increasing his share by stages until parity is reached, at least where he does an equal share of the work. The Medical Practices Committee consider that parity should be reached not later than at the end of 10 or 12 years, and generally

earlier. This is the principle on which the Medical Practices Committee generally acts. (See "Further Thoughts on Medical Practices" by N. Leigh Taylor, M.B.E., *Conveyancer*, Vol. 14, at p. 38, an article to which the writer desires to acknowledge his indebtedness). The result appears to be a fortunate one for a new partner, who would otherwise be likely to be at the mercy of the existing partners as to terms.

The prohibition against the sale of goodwill covers not only goodwill in respect of National Service patients, but also in respect of the private practice of a doctor who has joined the Service. It applies to goodwill derived from a practitioner who is outside the Service. Section 35 (1), however, permits a practitioner who has left the Service altogether to sell the goodwill of a practice in an area in which he has never practised under the Service. He could not, it seems, sell even the goodwill relating to his private practice in the area in which his name had been entered on the List, so far as it could be proved to be acquired since he left the Service: *cf.* section 8 of the Amendment Act. The Act, however, only forbids the sale of goodwill. Provision can lawfully be made for its transfer; and the difficulty is now usually met by providing for a partner's share of goodwill to vest in, or be acquired by, the other partners on dissolution, and to require payment only for his share of the other assets. It was held in *Whitehill* v. *Bradford* [1952] Ch. 236 that the prohibition on sale of goodwill does not destroy it, but that it remains an asset of the firm. Even in regard to National Health Service patients, there appears to be a goodwill, inasmuch as they can choose their own doctor.

Section 35 (9) provides that an application may be made to the Medical Practices Committee for their opinion whether a proposed transaction involves an unlawful sale of goodwill, and their certificate is a defence to any charge for an offence under the Act. In cases of doubt it is always wiser to obtain such a certificate.

### Payment for Assets Other Than Goodwill

The payment of a proper price for assets other than goodwill belonging to a partner in the Service on dissolution is not a sale of goodwill; and the same appears to be so where the payment is made by an incoming partner: see National Health Service Act, 1946, ss. 35 (4) (*a*) and (*b*), and (6) (*b*); but the payment of a price exceeding the market value might be held to be a sale of goodwill. The incoming partner must be in a position to show that no part of the payment was attributable to goodwill; and it may be wiser in all cases to provide for a valuation of such assets as valuable

appliances and drugs (other than those purchased out of money provided under the Service, which cannot be dealt with under the partnership) or motor-cars, unless they have been recently valued.

*Surgeries and Consulting Rooms.* The sale or letting of premises by a medical practitioner or his personal representatives, which were used for the purpose of his practice, to another practitioner for use in his practice, for a consideration substantially in excess of what would have been obtained had they not been so used, is by section 35 (3) deemed to be a sale of goodwill. But the Minister said in Committee when the Bill was before the House that it was proper to charge more for a house because of its different physical structure, *e.g.*, because it had a surgery. It seems clear that, though a house which has a well-equipped surgery or consulting room, or a room which can easily be separated from the rest of the house, may command a higher price when sold to another practitioner, the increased price can be separated from any adherent goodwill and a valuation obtained on this footing.

### Partnerships Where a Partner is Outside the Service

Where one or more partners have not joined the Service, more complicated questions arise. Such partners will not of course qualify for compensation for loss of the right to sell their goodwill. Only those who joined the Service prior to the appointed day under the National Health Service Act, 1946, *viz.*, July 5, 1948, or were then practising in partnership and entered their names prior to February 16, 1950, under the Amendment Act, will so qualify. A partner who remains outside the Service should therefore normally be paid for his share of goodwill on dissolution of the partnership; though the price to be paid under an option to the others in the Service to purchase his share should be calculated on the footing that the purchasing partners will be unable to sell his share in the future.

A clause should also be inserted to protect the firm should an outside partner wish to join the Service subsequently. He should not of course be at liberty to apply for his name to be entered on the Medical List for any other area; such a course would in any case be a breach of his obligation to devote his whole time to the partnership business. But even if he applies for his name to be entered for the area covered by the practice, the application may be granted under section 34 (4) subject to the limitation that he is not to practise under the Service in a specified part of that area, though there is no power of "direction" in the Service. Power should therefore be given to the other partners, should he elect to accept

such a limitation and enter the Service, to dissolve the partnership. The partner can appeal to the Minister against the terms imposed in accordance with paragraph 10 of the National Health Service (General Medical and Pharmaceutical) Regulations, 1956, and there is no necessity for the other partners to dissolve the partnership pending such an appeal, as the partner applying cannot in the meantime have his name entered on the List.

### Division of Patients and Remuneration

Under the Allocation Scheme, the maximum number of registered patients which a partner may have on his list is usually 3,500, or a number which brings the average number on the lists of all the partners up to 3,500. It is not necessary that the shares of the partners in the profits should correspond with the number of their registered patients; though, as we have seen, these shares must not be such as to constitute a sale of goodwill. In addition to capitation fees, practitioners are entitled to what are called "loadings," *viz.*, additional capitation payments calculated on the number of their registered patients between 500 and 1,500 at the beginning of each quarter. It is an advantage to have as many patients as possible between these limits. Accordingly paragraph 7 of Part III of the First Schedule to the General Regulations (the Distribution Scheme) provides that where the partners would be entitled to a greater number of loadings if the total number of patients on their lists were divided between them on a basis other than the existing basis, the total number may be allocated between them on an agreed basis for the purpose of calculating the loadings; but the number of loadings to be paid to each partner will still be proportionate to the number of his registered patients.

### Superannuation Benefits

The superannuation benefits of a practitioner in the Service, and the amount deducted from his capitation fees as contributions in respect thereof depend on the number of his registered patients. Where, therefore, his share of profits is not proportionate to the number of his registered patients, it is fairer for the deductions (which reduce the net profits of the partnership) to be made in proportion to his share of profits. Accordingly the National Health Service (Superannuation) Regulations, 1950 (S.I. 1950, No. 497), provide that if notice of the partnership is given to the Executive Council, the contributions to be deducted from the partners' remuneration will be pooled, and credited to the partners in proportion to their shares in the profits, so as to be, in effect, charged

proportionately thereto. This does not apply to the remuneration for hospital appointments; and a partner who receives such remuneration should, if his share of profits does not correspond with the number of his registered patients, account to the partnership for his gross remuneration, including the deduction.

### Restrictions on Practice

Medical partnerships normally contain a covenant restricting an outgoing partner's right to practise in competition with the firm. It appears from *Whitehill* v. *Bradford*, *supra*, that the Act has not destroyed the goodwill to be protected by such a covenant. Where the consideration for the covenant consists of the agreement to enter into partnership, and not payment for his share of goodwill, it will not be affected by the absence of any payment for goodwill to the outgoing partner. It is difficult to give any guidance for the drafting of such covenants. The nature, extent and period of the restriction depend on the particular circumstances; and, as Lord Evershed M.R. observed in *Whitehill* v. *Bradford*, *supra*, there should be no "common form" in such covenants.

The test in such cases is reasonableness; but there is always a proper subject matter for protection, and the protection can be against competition as such. The court adopts a reasonable construction of the language used, and will not look for extravagant or fanciful possibilities, and reject the covenant because it might be said that one or more of such possibilities might be comprehended by the strict language of the covenant. But the acts forbidden must be such as might in fact compete with the practice. Thus a covenant not to practise as a specialist or consultant in the ordinary sense cannot be taken by general medical practitioners; though it may, it seems, validly include performing specialist treatment without introduction by a practitioner: *Routh* v. *Jones* [1947] 1 All E.R. 758; *Jenkins* v. *Reid* [1948] 1 All E.R. 471. Nor should it cover professional appointments generally, as this might include appointments which cannot compete with the firm, *e.g.*, an appointment as Medical Officer of Health. As to the area of restraint, this depends primarily on the area substantially served by the practice; it is also material whether it includes a built-up area, and whether the covenant includes attending patients in the area from a residence or surgery outside it. As to the period, twenty-one years was held reasonable in the circumstances in *Whitehill* v. *Bradford*, *supra*; but a much shorter period, *e.g.*, five years, would usually be safer. It is always better in such covenants to err on the safe side.

# DISCRETIONARY TRUSTS

By Professor L. A. Sheridan, ph.d., ll.b., Barrister-at-Law

## I. Nature and Purposes

A discretionary trust arises where capital is vested in trustees who then have a discretion of one of the following kinds. First, the trustees may be called upon to decide whether or not to pay any part or all of the income or capital to a beneficiary or beneficiaries; for example, " £10,000 to X and Y on trust to pay such sums as they may think fit to A." Secondly, the discretion of the trustees may be limited to paying sums for a particular purpose, often the maintenance or education of infants. Thirdly, there may be several beneficiaries amongst whom the trustees must divide the whole, *i.e.*, the total amount to be paid is fixed, and the discretion of the trustees is limited to fixing the shares. There may also be other minor variations of these types of discretionary trust (*a*).

There seems no reason in principle why there should be any limit to the discretion. However, there is a line of nineteenth century cases in a contrary sense. In *Buckle* v. *Bristow* (*b*), there was a gift by will on trust to dispose of it " in such a way and manner, and for such purposes, as [the trustees], or the majority of them, might in their judgment and discretion agree upon." Page Wood V.-C. held that this was uncertain and there was a resulting trust. The trustees could not be regarded as having a general power of appointment (a) because the agreement of three people was required for any exercise, and (b) because the donees of the power, being trustees of it, were not themselves objects. During the nineteenth century it was widely thought that a special power was void for uncertainty unless the donee could at any time identify all the objects. That view has been shown to be wrong (*c*). A special power is certain if the donee can tell in respect of any appointee whether he is an object. Nowadays, on the facts of cases like *Buckle* v. *Bristow*, it would presumably be held that the trustees had a special power of appointment.

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(*a*) This is concerned with discretionary trusts expressly created. One does, of course, also get statutory examples. As to discretionary and spendthrift trusts generally, see Scott, *Law of Trusts* (2nd ed.), vol. 2, pp. 1083–1132.

(*b*) (1864) 10 Jur. (N.S.) 1904. Other cases are *Fowler* v. *Garlike* (1830) 1 Russ. & M. 232 (Leach M.R.); *Fenton* v. *Nevin* (1893) 31 L.R.Ir. 478 (C.A., Ireland).

(*c*) *Re Gestetner Settlement* [1953] Ch. 672.

Until recently, discretionary trusts were commonly met only as parts of two other types of transaction: first, as part of a protective trust; secondly, by way of providing for the maintenance and education of infants out of property to which they would become absolutely entitled on attaining their majority. Of course, discretionary trusts on their own were always possible, but only recently have they become a common conveyancing device: for the purpose of diminishing the incidence of death duties (*d*).

Discretionary trusts are simply one variety of power of appointment; other kinds of power are sometimes given to trustees. Courts have always treated them as special powers. The application of the rule against perpetuities (*e*) has been carried out in exactly the same way as for special powers. The evolution by the courts of their power to control trustees of a discretionary trust has culminated in something closely resembling the doctrine of fraud on a power, though not explicitly so called. It is, in fact, difficult to see why a separate name "discretionary trust" was invented. Not all powers of appointment change their name just because the donee is a trustee. It is also surprising that the application of the word "trust" to these transactions has not led to a collision between them and the principle on which the validity of other types of non-charitable purpose trust was queried in *Re Astor's Settlement Trusts* (*f*).

## II. Discretionary Trusts: Bare Powers and Powers in the Nature of a Trust

Discretionary trusts viewed as powers of appointment are always powers in the nature of a trust in one sense. That is to say, the donee of the power being a fiduciary personage, he is bound to exercise his discretion in a fiduciary manner. Sometimes the expression "power in the nature of a trust" is used in a different sense, namely, to differentiate a case in which the donee must appoint the whole fund, having a discretion merely to allocate the shares among the objects, from a bare power, where it is not necessary to make an appointment at all.

A discretionary trust may fall into either of the two latter categories, but it has been said (*g*) that the court will not be astute to find that it is a power in the nature of a trust. Examples, however,

(*d*) See "ABC," "Discretionary Trusts," (1953) 97 *Solicitors Journal* 379, where there is also a discussion of how to cut down the disadvantages of this device.

(*e*) See p. 63, *post*.

(*f*) [1952] Ch. 534.

(*g*) *Wilson* v. *Turner* (1883) 22 Ch.D. 521 (C.A.). See also *Re Kerrison's Trusts* (1871) L.R. 12 Eq. 422 (Malins V.-C).

can be found (*h*). Once you have got such an example, all the ordinary consequences follow. In *Longmore* v. *Broom* (*i*), Grant M.R. held that if the trustees made no disposition the court would order equal shares.

In *Re Smith* (*j*), Romer J. held that if there were a discretionary trust in favour of A, and any part of the fund not applied to A must be paid to B, then A and B could join in calling for the whole. This had earlier been held (*k*) to be the right of a joint mortgage from A and B.

### III. Discretionary Trusts and Contractual Rights to Payments

One case exists of a discretionary trust under which trustees are compellable by action to make payments sufficient for the purpose for which the trust was established. This occurs when a marriage settlement, to which the husband is a party, establishes a trust for the maintenance and education of the children. The husband is then entitled, as a matter of contract, to insist on the application of income for the maintenance and education of his children, even if he has himself ample means to pay for it (*l*).

In *Hoste* v. *Pratt* (*m*), there was a discretionary trust, created by will, for the maintenance of children. Payment was directed to be made to their father without regard to his means. Despite the fact that the father's claim could not be based on contract, Lord Loughborough evidently thought he was following his earlier decision in *Mundy* v. *Earl Howe*. *Hoste* v. *Pratt* is not necessarily wrong. It may be the true meaning of a bequest of that kind that the father is to have a right to call for payment. Conversely, it may be the true meaning of a marriage settlement that the husband has no such right. This was the view adopted by Lord Cottenham in *Thompson* v. *Griffin* (*n*), where he declined to apply his own previous decision in *Stocken* v. *Stocken*. He said (*o*)—

(*h*) See *Re Peel* [1936] Ch. 161 (Eve J.). See also the marriage settlement cases, *infra*.

(*i*) (1802) 7 Ves. 124.

(*j*) [1928] Ch. 915.

(*k*) *Re Nelson* (1918) [1928] Ch. 920n. (C.A.).

(*l*) *Mundy* v. *Earl Howe* (1793) 4 Bro.C.C. 223 (Lord Loughborough); *Meacher* v. *Young* (1834) 2 My. & K. 490 (Leach M.R.); *Stocken* v. *Stocken* (1838) 4 My. & Cr. 95 (Lord Cottenham); *Ransome* v. *Burgess* (1866) L.R. 3 Eq. 773 (Kindersley V.-C.).

(*m*) (1798) 3 Ves. 730. See also *Malcolmson* v. *Malcolmson* (1885) 17 L.R.Ir. 69 (C.A., Ireland).

(*n*) (1841) Cr. & Ph. 317. *Cf. Hughes* v. *Hughes* (1784) 1 Bro.C.C. 387 (Lord Thurlow); *Lucknow* v. *Brown* (1848) 12 Jur. 1017 (Wigram V.-C.); *Malcolmson* v. *Malcolmson* (1885) 17 L.R.Ir. 69.

(*o*) (1841) Cr. & Ph. 320–321.

"If the property of the children had been derived from the bounty of a stranger, there could be no doubt but that the father, being of the ability to maintain his children, could not be entitled to any allowance out of the income of their property for that purpose; but the claim of the father rests upon the distinction which has been taken between the cases in which the property of the children is derived from the bounty of a stranger, and those in which they are entitled to it under the marriage settlement of their parents, such as *Mundy* v. *Lord Howe*, *Stocken* v. *Stocken*, and *Meacher* v. *Young*. It appears to me that the distinction between these two classes of cases has been carried quite as far as can be justified upon principle. In some of them it has been said that, in the case of marriage settlements, the father is a purchaser, and therefore entitled to an allowance for the maintenance of his children, and thereby to be relieved from the burthen which the law throws upon him of maintaining them himself. No doubt he is so if the contract contained in the settlement gives him such benefit; but, before he can be entitled to it, he must shew that such was his contract. So, in the case of a legacy from a stranger, if the intention, to be found in the construction of the will, appears to have been that the father should have such a benefit, the court is bound to give it to him. In both cases, the question is one of construction and intention."

### IV. Control of Discretion by Court

Appointments of sums of money under a discretionary trust, or a failure to make any appointment, may in appropriate circumstances be reversed or modified by the court. The trouble is to ascertain what circumstances are appropriate. In general, it would seem, there is a distinction between a discretion expressed to be "uncontrollable" or some such adjective, and the discretion which is not characterised by any enlarging words.

#### A. "*Uncontrollable*" *Discretion*

Interference with an appointment in pursuance of this type of discretion will take place only on the basis of mala fides. However unwise, an exercise of the discretion made in good faith will not be impugned. The House of Lords decided this in *Gisborne* v. *Gisborne* (*p*), where trustees had power to apply funds for the maintenance of a lunatic "in their discretion, and of their uncontrollable authority." Malins V.-C. applied the principle in

(*p*) (1877) 2 App.Cas. 300.

*Tabor* v. *Brooks* (*q*), where the power of the trustees to maintain a drunkard was to be exercised as "they or he (*r*) shall in their or his uncontrolled and irresponsible discretion think fit" (*s*). Presumably the meaning of "mala fides" when applied to a payment to an object of the discretionary trust is that there has been a fraud on the power (as that phrase is used in relation to special powers of appointment).

B. *Unenlarged Discretion.*

When trustees are given a straightforward discretion, without additional words of irresponsibility, there has been some difference of opinion as to the extent of court competence to interfere. In *Re Hodges* (*t*), the objects of a discretionary trust were wards of court, to whose maintenance the trustees were applying part of the available money. When the father applied for more, the trustees resisted. Malins V.-C. said—

> "The only thing I have to look to is the interest of the wards, and what is best for them . . . (*u*)
>
> "I beg to say I act upon the principle, and until I am overruled I shall continue to act on the principle, that I have a controlling power over all trustees (*v*).
>
> ". . . if . . . the discretion of the trustees is to be absolute and uncontrollable, the court will not interfere; but where the will says that the whole or any party [*sic*] shall be applied according to the discretion of the trustees, the court may allow more if it thinks fit. If the discretion of the trustees is, in the opinion of the court, improperly exercised, the court will control that improper exercise."(*v*)

What was proper was what was in the best interests of the objects. It does not appear from the learned Vice-Chancellor's judgment that he regarded the fact that the objects were wards of court as of any significance. In *Maberly* v. *Turton* (*w*), where the objects were not wards of court, Lord Eldon said that regard had to be had "to the

(*q*) (1878) 10 Ch.D. 273.
(*r*) *i.e.*, in the event of there being only one trustee.
(*s*) See also *Costabadie* v. *Costabadie* (1847) 6 Hare 410 (Wigram V.-C.); *Re Beloved Wilkie's Charity* (1851) 3 Mac. & G. 440 (Lord Truro); *Chambers* v. *Smith* (1878) 3 App.Cas. 795 (from Scotland); Kiralfy, "A Limitation on the Discretionary Powers of Trustees" (1953) 17 *Conveyancer* 285.
(*t*) (1878) 7 Ch.D. 754.
(*u*) At p. 760.
(*v*) At p. 761.
(*w*) (1808) 14 Ves. 499, 502. *Cf. Hawkins* v. *Watts* (1834) 7 Sim. 199 (Shadwell V.-C.); *Bateman* v. *Foster* (1844) 1 Coll. 118 (Knight Bruce V.-C.).

situation, circumstances, and ability, of the father, and the fortunes of his children" in testing the propriety of an appointment (*x*).

The Court of Appeal in Chancery, in *Brophy* v. *Bellamy* (*y*), took the view that the court could interfere only in cases of bad faith. In *Re Bryant* (*z*), where a will gave property on a discretionary trust for the maintenance of infants, the trustees refused to make any payment because their mother had £5,000 a year. The trustees having made a bona fide exercise of their discretion, Chitty J. refused to consider any other factor. The same learned judge came to the same decision in *Re Boys* (*a*).

*Jervoise* v. *Silk* (*b*) was not a case of a discretionary trust, but is of interest in showing the early nineteenth century attitude to a father's ability to maintain his children. Six infant children had vested interests (payable on attaining majority) in rents worth £8,600 and increasing in value. Their father, whose income was £6,000 a year, petitioned for payments towards their maintenance to be made to him out of their equitable interests. The petitioner stated by affidavit that the expenses of his establishment, consisting of a house in Hanover Square, a house in Essex, and another in Hampshire, were fully equal to his income. The Master found that £1,400 a year for the six children, including a governess for the girl, would be a proper allowance. Grant M.R. so ordered, saying (*c*)

> "It is very loose to consider any particular income as enabling a father to maintain his children. To a nobleman £6,000 a year certainly would not be thought enough to exclude him from requiring some maintenance out of his children's fortune. To a private gentleman it may be otherwise. On the outside, it here would seem enough; at the same time the expenses of his establishment, and his children's expectations, are circumstances to be looked to. It would be a harsh thing for the court to oblige the petitioner to put down his establishment in any part to educate his children, when they have large incomes of their own."

Interference by the court with an exercise by trustees of their discretion should, it is submitted, be based on an application of the ordinary rules against fraud on a power. In other words, an

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(*x*) See also *Collins* v. *Vining* (1837) C.P. Coop. 472 (Lord Langdale M.R.); *Douglas* v. *Andrews* (1839) 3 Jur. 949; *Bateman* v. *Foster* (1844) 1 Coll. 118; *Re Roper's Trusts* (1879) 11 Ch.D. 272 (Fry J.); *Re Weaver* (1882) 21 Ch.D. 615 (C.A.); *Train* v. *Clapperton* [1908] A.C. 342 (from Scotland); *Klug* v. *Klug* [1918] 2 Ch. 67 (Nevill J.); *Tan Jooi Khim* v. *Ng Jooi Thong* (1954) 5 M.L.R. 28 (Wilson J., Federation of Malaya).

(*y*) (1873) L.R. 8 Ch.App. 798.

(*z*) [1894] 1 Ch. 324.

(*a*) (1896) 41 Sol.Jo. 111. And see *Re Lofthouse* (1885) 29 Ch.D. 921 (C.A.).

(*b*) (1813) G. Coop. 52.

(*c*) (1813) G. Coop. 53.

appointment may be impugned if made with a view to benefiting a non-object or with a view to benefiting an object in a way not intended by the settlor (*d*).

## V. Assignments

A "beneficiary" under a discretionary trust has, of course, no action against the trustee to claim payment. He is in the same position as an object of any other type of special power of appointment. One would think that his interest was a *spes successionis*, whose assignability in equity was governed by the same principles as the assignment of any other future chose in action.

The Court of Appeal considered this in *Re Coleman* (*e*). They held that, when there had been an assignment, with notice to the trustees, then, as soon as the trustees decided to pay anything to the assignor, the assignment took effect on that projected payment, and the trustees must pay the assignee. This seems difficult to swallow on two grounds. First, it puts an assignee by express transfer in a better position than an assignee by operation of law on bankruptcy. The latter, it would appear (*f*), cannot take sums appointed except in so far as they exceed reasonable provision for maintenance. Secondly, where the discretionary trust is expressly limited to a purpose, *e.g.*, maintenance or benefit of the object, any payment to an assignee would seem to be a breach of trust unless the assignment was in consideration of maintenance or education (or whatever the purpose may be). Underhill (*g*) regards the law as in "an anomalous and unsatisfactory state." In any case, presumably, the trustees will preserve the trust property, if *Re Coleman* is right, by simply not appointing anything to the assignor. The result will be that no assignee will be forthcoming.

## VI. Bankruptcy of Object

The effect of bankruptcy of an object of a discretionary trust is none too clear, and Underhill (*g*) includes this is in his condemnation as anomalous and unsatisfactory. One thing which is quite clear is that, where a settlor makes a settlement by way of discretionary trust for consideration, it is not voidable by his creditors merely because he is also one of the objects. This was decided by Page Wood V.-C. in *Holmes* v. *Penney* (*h*), where he also said *obiter* that such a settlement is not necessarily voidable if voluntary.

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(*d*) See Sheridan, *Fraud in Equity*, pp. 116–124.
(*e*) (1888) 39 Ch.D. 443. See also *Re Neil* (1890) 62 L.T. 649 (Kekewich J.).
(*f*) See the next section.
(*g*) *Law Relating to Trusts and Trustees* (10th ed., 1950), p. 84.
(*h*) (1856) 3 K. & J. 90.

In *Re Ashby* (*i*), Vaughan Williams J. held that an assignee in bankruptcy was not entitled to get at income or capital subjected to a discretionary trust. Decisions to the same effect were given by Kekewich J. in *Re Bullock* (*j*) and by Page Wood V.-C. in *Holmes* v. *Penney* (*k*). Vaughan Williams J. added *obiter* (*l*)—

> "... it seems to me ... to the extent to which sums are paid to the bankrupt in excess of the amount necessary for his mere support, then the trustee in bankruptcy will be able to insist upon the bankrupt accounting to him for the rents and profits so received."

Kekewich J., on the other hand, had thought that the trustees must not pay any income to the bankrupt (who was the sole object of the discretionary trust), being allowed only to apply it themselves for his maintenance. Page Wood V.-C., in the case before him, had pointed out that, where the trustees had an absolute discretion, and there were several objects of the power, the court could not apportion the fund between the objects with a view to allotting a certain share to the assignee in bankruptcy of one of them.

Another line of cases was initiated by *Page* v. *Way* (*m*). There was a discretionary trust in favour of Jones, his wife and children. Jones went bankrupt. Lord Langdale M.R. said (*n*)—

> "I am of opinion, that so long as the wife and children were maintained by Jones, the trustees had a discretion to give him the whole income, but that it was their duty to see that the wife and children were maintained. The assignees take everything subject to what is proper to be allowed for the maintenance of the wife and children, and it must be referred to the Master to settle a proper allowance."

Quite apart from the fact that no one seemed enthusiastic about maintaining a bankrupt Jones, this result is strange.

Naturally, the assignee in bankruptcy comes off better if the power is in the nature of a trust, and there is only one object. There the trust is a real trust, not a power at all, and the "object" is a beneficiary with a vested interest. In *Green* v. *Spicer* (*o*), trustees

(*i*) [1892] 1 Q.B. 872. See also *Twopeny* v. *Peyton* (1840) 10 Sim. 487 (Shadwell V.-C.).

(*j*) (1891) 64 L.T. 736. See also *Godden* v. *Crowhurst* (1842) 10 Sim. 642 (Shadwell V.-C.).

(*k*) (1856) 3 K. & J. 90.

(*l*) [1892] 1 Q.B. 877.

(*m*) (1840) 3 Beav. 20. See also *Kearsley* v. *Woodcock* (1843) 3 Hare 185 (Wigram V.-C.); *Wallace* v. *Anderson* (1853) 16 Beav. 533 (Romilly M.R.).

(*n*) (1840) 3 Beav. 21.

(*o*) (1830) 1 Russ. & M. 395 (Leach M.R.). See also *Piercy* v. *Roberts* (1832) 1 My. & K. 4 (Leach M.R.); *Younghusband* v. *Gisborne* (1844) 1 Coll. 400 (Knight Bruce V.-C.).

had a discretion as to how to apply money, but not as to the amount, being obliged to pay the whole income to A. Here, A had a life interest, and on his bankruptcy it passed by operation of law.

### VII. Rule Against Perpetuities

The validity of discretionary trusts is tested against the perpetuity rule in the same way as are other trusts for non-charitable purposes, *i.e.*, in the same way as are special powers of appointment generally. That is to say, if a discretionary trust may last longer than the perpetuity period, *i.e.*, if an appointment might be made (were the power valid) after the expiration of the period, the transaction is void (*p*).

### VIII. Statutory Discretionary Trusts

Discretionary trusts for maintenance and advancement are imported into certain express trusts by sections 31 (*q*) and 32 (*r*) respectively of the Trustee Act, 1925.

### IX. Future of Discretionary Trusts

No doubt the creation of any power is a gamble. In general, a donor is better advised to give his property outright rather than delegate the task of selecting the recipient. Since the enactment in 1881 of statutory powers of maintenance of infants, one big reason for creating express discretionary trusts has departed. They are now required mainly to avoid death duties and to avoid creditors.

So far as death duties are concerned, it is presumably up to the legislature, and not the courts, to play chess with conveyancers.

The position of a bankrupt object of a discretionary trust is uncertain, and it is difficult to determine what it ought to be. On the one hand it might be said that lenders to such people should be aware that they have no assignable claim. On the other hand, when a person gives all the appearances of affluence—and under some discretionary trusts payments are very large indeed—what tradesman is going to make unpleasant inquiries before extending credit? In any case, even if the inquiries are made, answers are not

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(*p*) *Re Wise* [1896] 1 Ch. 281 (North J.); *Re Blew* [1906] 1 Ch. 624 (Warrington J.); *Re Coleman* [1936] Ch. 528 (Clauson J.). See also Morris and Leach, *Rule Against Perpetuities*, pp. 127, 134–135.

(*q*) Comparative legislation:—Northern Ireland: Conveyancing Act, 1881, ss. 42, 43; Federation of Malaya: Trustee Ordinance, 1949 (No. 66), s. 33; Singapore: Trustee Ordinance (1955 revised ed., c. 34), s. 33.

(*r*) There is no statutory power of advancement in Northern Ireland. In the Federation of Malaya and in Singapore, ss. 34 of the Ordinances mentioned in the last subsection govern it.

guaranteed. It is not part of the duty of trustees to give information about the beneficial interests to all and sundry. Where there is only one object of the power, the capitalised value of his expectations in the light of past experience might be allotted to his creditors on bankruptcy. The calculation is only slightly complicated by the existence of a plurality of objects. *Re Smith* (*s*) provides an interesting reflection. If A had gone bankrupt alone, on the present authorities his assignee in bankruptcy would have got nothing except at the discretion of the trustees. The same applies to B's assignee had he gone bankrupt alone. If A and B both went bankrupt, unless their lists of creditors were identical, it would be in the discretion of the trustees how much of the fund went to A's debts and how much to B's. This seems to overstep the mark at which public policy must curb individual powers of disposition.

(*s*) See p. 57, *ante*.

# NOTES OF RECENT CASES

## 1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor

*Manning* v. *Turner* [1957] 1 W.L.R. 91; [1956] 3 All E.R. 641
(Chancery Court of the County Palatine of Lancaster)

*Sale of land—contingent liability to estate duty after gift inter vivos—defect in title—repudiation of contract.*—It is satisfactory to find this decision of the Palatine Court preserved from the oblivion of the unreported, for it deals with a previously undecided question of title.

In 1954 the defendants, vendors selling as beneficial owners, deduced to the plaintiff a title which included a deed of gift dated 1953. On October 20 the plaintiff's solicitors delivered a requisition requiring the defendants to provide an indemnity policy against the potential charge for estate duty if the donor should die within five years of the gift. (Finance Act, 1894, s. 2 (1) (c), as amended by the Finance Act, 1946, s. 47.) On November 4 the defendants' solicitors offered instead an indemnity by their clients; on November 8 this offer was refused, the contract repudiated and return of the deposit demanded. Nevertheless further correspondence ensued and on December 21 the plaintiffs repeated their repudiation and demand for the deposit. Subsequently an action was begun, the defendants counterclaiming specific performance on the footing of their providing an indemnity policy for the full purchase price.

Sir Leonard Stone, Vice-Chancellor, held that the contingent liability for death duties was a flaw in the title, since the property itself would be primarily liable; the title was not one the court would force on a purchaser unless an indemnity was provided. (*Cf.* George on *The Sale of Land*, at p. 182.) Since the land would be aggregated with other property of the donor to determine the rate of duty, a policy would need to be for a figure near the full value. This contingent liability does not appear to be registrable as a land charge, but a purchaser will not be liable in the absence of notice (Finance Act, 1894, s. 9 (1) ). In practice a purchaser will have notice if the title is unregistered, but rarely if it is registered (see Emmet on *Title*, 14th ed., Vol. 2, at p. 559, for discussion), unless the entry on the register of the date at which the proprietor was registered could put a purchaser on inquiry, which would seem a very extreme application of the doctrine of constructive notice. A condition in the contract can of course cover the point under discussion; as regards auction sales, it seems possible that a mere prohibition of requisitions would be ineffective unless full disclosure of the defect was made—see Emmet on *Title*, 14th ed., Vol. I, at p. 126, and compare, on covenants, *Simmons* v.

*Pennington* [1955] 1 W.L.R. 183; [1955] 1 All E.R. 240, discussed, *ante*, Vol. 19, at pp. 171, 219.

The learned Vice-Chancellor also held, on the facts, that the plaintiff had repudiated sufficiently promptly without subsequent waiver, though "it would have been wiser if her solicitors had served a notice setting a time limit" ([1957] 1 W.L.R. 98). Whether the right of repudiation has been exercised or waived must always depend on the particular facts (*cf. Halkyn* v. *Dudley* (*Earl*) [1907] 1 Ch. 590; *Elliott* v. *Pierson* [1948] Ch. 452), but it is interesting to see that the learned Vice-Chancellor did not consider that a purchaser loses his rights by a limited amount of discussion on the basis "I repudiate unless. . . ."

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*Williams* v. *Greatrex* [1957] 1 W.L.R. 31;
[1956] 3 All E.R. 705 (C.A.)

*Sale of land—specific performance—delay—inapplicability of doctrine of laches.*—In an action for specific performance the defence of laches cannot normally be pleaded against a proposed lessee who is in possession on the terms of the intended lease (Fry, *Specific Performance*, 6th ed., p. 517; Halsbury, *Laws of England*, 2nd ed., Vol. XXXI, p. 405; *Crofton* v. *Ormsby* (1806) 2 Sch. & Lef. 583; *Shepheard* v. *Walker* (1875) L.R. 20 Eq. 659); only conduct amounting to abandonment of the contract will prevent his clothing the equitable with the legal title. Such a rule is of course essential to the doctrine of *Walsh* v. *Lonsdale* (1882) 21 Ch.D. 9. The Court of Appeal (Denning, Hodson and Morris L.JJ.) here applied this law without hesitation to a contract for the sale of land, in conjunction with the general principle that time is not of the essence of such a contract. (*Stickney* v. *Keeble* [1915] A.C. 386; *Smith* v. *Hamilton* [1951] Ch. 174; *Re Barr's Contract* [1956] 1 W.L.R. 918; [1956] 2 All E.R. 853, noted, *ante*, Vol. 20, p. 403.) As a result the court granted specific performance of a ten-year-old contract, after investigating somewhat complicated facts involving a dispute about possession between vendor and purchaser. The occasion for the action was a fresh contract for sale between the vendor and a third party. The original purchaser had not registered his estate contract but, as Denning L.J. pointed out, this was irrelevant because the would-be second purchaser never became a "purchaser of a legal estate for money or money's worth" (Land Charges Act, 1925, ss. 10 (1), Class C (iv), 13 (2)). Where the equities are equal, the first in time prevails.

On the main point this decision could be of considerable importance if dealings with land by contract rather than by conveyance should ever become at all widespread. Without in any way advocating such a development it may be noted that a possible legal obstacle has been removed.

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*Watson* v. *Burton* [1957] 1 W.L.R. 19;
[1956] 3 All E.R. 929 (Ch.D.)

*Sale of land—misdescription as to area—whether substantial—specific performance—Law Society's Conditions of Sale,* 1953, *Condition* 35.—Where land comprised in a contract of sale is innocently misdescribed so as to be substantially different from what the purchaser contracted to buy, so that, if he had known the truth, he would not have entered into the contract at all, the purchaser can rescind or resist specific performance. The leading case is *Flight* v. *Booth* (1834) 1 Bing.(N.C.) 370, which "has come to have almost the authority of an Act of Parliament and is proof against special conditions in contracts" (Emmet on *Title,* 13th ed., Vol. I at p. 61—words omitted in the 14th ed.). In the present case Wynn-Parry J. had to consider also Condition 35 of the Law Society's Conditions of Sale, 1953, providing that errors in quantity shall not annul a sale, nor shall compensation be allowed, but that neither party shall be compelled to accept or convey "property which differs substantially from the property agreed to be sold and purchased . . . if the purchaser or the vendor respectively would be prejudiced by reason of such difference." The facts were that industrial premises purchased at auction for £4,500 were described in the particulars of sale as containing approximately 3,920 square yards, whereas the actual area was only 2,360 square yards. The purchaser gave evidence, accepted by the court, that he had based his bidding on a calculation of £1 per square yard, plus £500 for the buildings.

After reviewing a number of authorities, especially *Whittemore* v. *Whittemore* (1869) L.R. 8 Eq. 603, *Flight* v. *Booth, supra,* and *Jacobs* v. *Revell* [1900] 2 Ch. 858, Wynn-Parry J. held (1) the court is less inclined to decree specific performance where compensation is excluded than where it is permitted; (2) the court has the duty of deciding what is a "substantial difference"; (3) the difference here of 40 per cent. between the stated and actual areas was substantial; (4) the purchaser was prejudiced because he had based his price on the stated area; and (5) the vendor's plea for specific performance with compensation could not be allowed because such a variation in the contract could not be forced on a purchaser, citing *Rutherford* v. *Acton-Adams* [1915] A.C. 866. Consequently the purchaser could rescind and recover his deposit.

The learned judge did not specifically distinguish *Re Fawcett and Holmes' Contract* (1889) 42 Ch.D. 150, where in somewhat similar circumstances a difference of 40 per cent. in area was held caught by a condition allowing compensation; however, in that case the purchaser apparently bid for what he actually saw without any particular reliance on the stated area.

It will be seen that Wynn-Parry J. dealt with substantial difference and prejudice within Condition 35 as separate points. With respect, it seems doubtful if the condition has succeeded in glossing *Flight* v. *Booth,* at least so far as a purchaser is concerned. (As to a vendor, see Dr. E. O. Walford in 17 *Conveyancer,* at pp. 263–264.) All the cases indicate that the purchaser must prove he is adversely affected by a misdescription before it will be deemed substantial within *Flight* v. *Booth.*

*Robertson* v. *Cilia* [1956] 1 W.L.R. 1502; [1956] 3 All E.R. 651 (Ch.D.)

*Mortgage—claim for possession—court's power to adjourn proceedings—impossibility of replacing loan—R.S.C., Ord. 55, r. 5A, and Practice Directions thereunder.*—The mortgagor (the defendant) fell into arrears with repayment by instalments in 1953 and the mortgagee (the plaintiff) thereby became entitled to enforce her security. Eventually the plaintiff gave notice calling in the mortgage in February, 1956, and issued a summons for possession in May, 1956. In July, 1956, this summons was adjourned and by the time of the further hearing in October all arrears of instalments had been paid. Nevertheless the plaintiff, being pressed to reduce an overdraft, still desired possession and the defendant, because of the credit squeeze, could not raise an alternative loan. There is a general power to adjourn a summons for possession under R.S.C., Ord. 55, r. 5A, and a Practice Direction (*Annual Practice*, 1956, p. 1125). Nevertheless Upjohn J. held that he had no power to adjourn the summons indefinitely, or even for a year, without the plaintiff's consent, referring to *Hinckley and South Leicestershire Permanent Benefit Building Society* [1941] Ch. 32. To do so would be to force a fresh agreement on the parties, and would also "amount to an arbitrary refusal to hear the case" ([1956] 1 W.L.R., at p. 1507; [1956] 3 All E.R., at p. 655). Consequently an order for possession in two months was made, despite evidence that considerable hardship would be caused to the defendant.

There can, of course, be no gainsaying the general principle that it is the duty of the courts to give effect to the legal rights of litigants (*cf. Re Yates Settlement Trusts* [1954] 1 W.L.R. 564; [1954] All E.R. 619, noted *ante*, Vol. 18, p. 187, concerning the remodelling of settlements); moreover, lenders as well as borrowers have their difficulties. Yet the decision has some disturbing implications, for the ability to replace loans may be regarded as an essential element in a society and economy where much, if not most, ownership of land is subject to mortgage. A jurisdiction to refuse possession on grounds of greater hardship (which Upjohn J. here remarked had not been given by Parliament) might become extremely desirable in conditions of prolonged credit squeeze.

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*John Meacock & Co.* v. *Abrahams* [1956] 1 W.L.R. 1463; [1956] 3 All E.R. 660 (C.A.)

*Auctioneers—instructed by mortgagee—sale by mortgagor—whether commission payable—interpretation of contract.*—The defendant as second mortgagee instructed the plaintiffs to sell by auction the mortgaged property, which consisted of five houses. The parties contracted on the terms issued by the Chartered Auctioneers' and Estate Agents' Institute, clause 10 of which reads: "Sale before auction. If a sale of the property, whether arranged by the auctioneer or not, is effected between the date of acceptance of instructions and the date of the auction, commission is payable to

the auctioneer on the same scale as for a sale by auction." Before the date of the auction the mortgagor contracted to sell four of the houses to the sitting tenants, and also raised the money to pay off the mortgage. The plaintiffs claimed commission on the reserve price or alternatively the same sum on a *quantum meruit*.

This variation on a familiar theme divided the Court of Appeal, which reversed the county court judge by a majority. Denning and Hodson L.JJ., with Morris L.J. dissenting, held that clause 10, quoted above, related only to sales by the client, and could not be interpreted to cover sales by a third party, citing a similar view expressed by Harman J. in the unreported case of *Murad* v. *Hearts of Oak Benefit Society* (Nov. 4, 1955). All three Lords Justices agreed that no claim lay on a *quantum meruit* because the contract specifically provided for payment only on the happening of a particular event.

This decision, and others before it, show that a heavy burden lies on the estate agent who claims commission in circumstances other than a completed sale to a purchaser introduced by him. Unless the contract clearly and precisely covers the actual facts it will be construed against the agent. This perhaps accords with the view of the man in the street if not with that of the profession concerned, and—as the cases show—there are arguments on both sides. It may be added that in the instant case the auctioneers did recover their out-of-pocket expenses.

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## 2. *TRUSTS*

By F. R. Crane, ll.b., *Solicitor*

*Re Dicey (deceased)* [1956] 3 W.L.R. 981; [1956] 3 All E.R. 696 (C.A.)

*Election—gift to plaintiff of property in which testatrix had life interest only—defendant entitled to half of that property in remainder absolutely—gift of residue to defendant.*—The Court of Appeal (Lord Evershed M.R., Birkett and Romer L.JJ.), affirming the decision of Danckwerts J. (noted *ante*, Vol. 20, p. 242, where the facts are given), has rejected the argument that no case for election arises unless the person called upon to elect can secure that the relevant provisions of the instrument shall take effect precisely according to their terms. Romer L.J., delivering the reserved judgment of the court, held that " in its simplest terms the rule . . . [is] . . . that one who is given a benefit under a will but whose property the testator purports to give to someone else must make up his mind whether he will take under (or approbate) the will, or whether he prefers to adhere to his already existing proprietary claim and renounce (or reprobate) the testamentary disposition . . . the obligation of him who approbates the will must be, by renouncing his outside interest, to let the will wholly take effect so far . . . as the renunciation of that outside interest permits him to do so " ([1956] 3 W.L.R. at p. 987; [1956]

3 All E.R. at p. 700), considering especially *Cooper* v. *Cooper* (1874) L.R. 7 H.L. 53; *Re Lord Chesham* (1886) 31 Ch.D. 466; *Lissenden* v. *C.A.V. Bosch, Ltd.* [1940] A.C. 412, at pp. 417 *et seq.*). The doctrine does not, however, apply where the beneficiary has no power to dispose of that property of his own which the will gives to another: *Re Lord Chesham, supra*; *Brown* v. *Gregson* [1920] A.C. 860. The latter case was explained by Romer L.J. as turning on the fact that land in the Argentine, already belonging to the beneficiaries under the will, could in no effective way be made subject to the trusts which the testator had sought to impose on it.

Consequently a person with only a partial interest in property can be put to his election just as much as a person with an absolute interest.

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*Re Edwards (deceased)* [1956] 3 W.L.R. 771; [1956] 3 All E.R. 526 (Ch.D.)

*Election—gifts by will of testatrix's own property—subsequent disposition inter vivos by testatrix—whether ademption or election—Wills Act, 1837, s. 24.*—By the Wills Act, 1837, s. 24, a will speaks as to property from the death of the testator. Consequently if A, having by will given specific property to B and other benefits to C, subsequently conveys the specific property to C, whether or not for value, then on A's death C is put to election.

A testatrix devised her house specifically, and also, separately, the residue of her property, to seven beneficiaries, including the first defendant E. M. W., in equal shares. Later the testatrix agreed to give E. M. W. two rooms rent free and to leave her the house absolutely, if E. M. W. would give up her house and come to look after the testatrix. E. M. W. did this and shortly afterwards the testatrix died. The arrangement was held in earlier unreported proceedings to constitute a valid and binding contract (and, one may add, presumably an irrevocable licence during the testatrix's life) and the house was conveyed to E. M. W. Upjohn J., after citing statements of principle found in *Cooper* v. *Cooper* (1874) L.R. 7 H.L. 53 and Jarman on *Wills*, 8th ed., at pp. 545–546 and 1137, now held that E. M. W. must elect (it being conceded that in this event she had already elected against the instrument). The learned judge rejected the argument that a conveyance after the will results merely in ademption, distinguishing *Plowden* v. *Hyde* (1852) 2 Sim.(N.S.) 171 as decided on the pre-1837 law, and adding "since the Wills Act of 1837, all that has to be found is the disposition of the property of another who receives other benefits under the will" ([1956] 3 W.L.R., at p. 776; [1956] 3 All E.R., at p. 530).

This decision appears to widen the scope of the doctrine of election. Election has hitherto arisen either from a mistake by the testator (*e.g., Re Dicey noted supra*; *Cooper* v. *Cooper, supra*) or from his deliberate attempt to control property which does not belong to him (*e.g., Re Burton* [1955] Ch. 82, where persons entitled in default of appointment were forced to elect between resettling the settled property, or losing an interest on residue). In these instances

the will is partially ineffective both when made and at the testator's death; the doctrine of election effectuates the presumed intention of the testator and is also generally equitable. Where, however, the testator conveys his own property after the date of the will, it is submitted, with respect, that it would be preferable to apply simply the doctrine of ademption. This could only be achieved, it would seem, by restricting the operation of the Wills Act, 1837, s. 24, to defining the property effectually disposed of by the will (*cf. Langdale (Lady)* v. *Briggs* (1856) 8 De G.M. & G. 391, *per* Turner L.J., at p. 432). It may be observed that gifts of "all my jewellery" or "all my personal effects" to B, followed by transfer of some of that property to another beneficiary under the will, will not raise election because the relevant phrases, by section 24 of the Wills Act, will carry only the jewellery or effects owned by the testator at death.

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*Re Sayer Trust* [1956] 3 All E.R. 600 (Ch.D.)

*Trusts and powers—certainty of objects—wide class of beneficiaries —use of word "dependants."*—The court was here asked to determine the validity (1) of powers to make grants from a trust fund to (a) employees or ex-employees of a confectionery company or (b) their widows or (c) their infant children or other infant dependants or (d) their other dependent relatives, and (2) of a trust, in certain events, for the benefit of employees or ex-employees of the company. There was no infringement of the rule against perpetuities.

The evidence showed that no list of ex-employees could be made, because the assistants in the many shops of the company frequently changed. Consequently Upjohn J. held, on point (2) above, that the trust was void, because all the objects at any one moment could not be ascertained (following *Inland Revenue Commissioners* v. *Broadway Cottages Trust* [1955] Ch. 20).

As regards the powers, the learned judge first accepted that a power is valid "if it is possible to decide with sufficient certainty whether any particular praepositus is an object of the power or not" (following *Re Gestetner* [1953] Ch. 672 and *Re Coates* [1955] Ch. 495 where the powers were valid; see too *Re Gresham* [1956] 1 W.L.R. 573; [1956] 2 All E.R. 193 where the power was invalid). He then held that the same principles of construction have to be applied to uncertain language whether used in trusts or powers. On this basis, though "employees and ex-employees" was clear and "relatives" was not attacked (see Jarman on *Wills*, 8th ed., p. 1161 *et seq.*), the word "dependants" caused difficulty, having regard especially to two conflicting trust cases, *Re Ball* [1946] Ch. 228 and *Re Hooper's 1949 Settlement* (1955) 34 A.T.C. 3. Upjohn J., saying that the problem must be approached in a practical way, held that the trustees or the court could in fact determine whether a particular person was properly described as a "dependent relative." Therefore the powers were good. Finally, it was held that the absence of any effective gift over on non-exercise of the powers did not render

the whole trust deed too uncertain, because the law would imply a resulting trust for the settlor.

The decision shows that there may be danger using general descriptions to enumerate wide classes of beneficiaries under powers or trusts. It may be safer to refer to particular relationships only. In the present case little would have been lost by omitting the word " dependants " altogether, and relying on the trustees to help only needy relatives.

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*Re Somech, decd.* [1956] 3 W.L.R. 763;
[1956] 3 All E.R. 523 (Ch.D.)

*Infant—right to receive property under trust instrument—discretion as to payment remaining in trustees.*—Prima facie a legacy cannot be paid, or a trust fund distributed, to an infant because he or she cannot give a valid receipt, nor release the trustees from their obligations (Jarman on *Wills,* 8th ed., pp. 114, 1090; Lewin on *Trusts,* 15th ed., p. 769). A married infant can give a receipt for income, including accumulation (Law of Property Act, 1925, s. 21), and payment of capital can be made to any infant if the will or trust instrument so provides (*Re Deneker* [1895] W.N. 28). In the present case the trust instrument—a will—provided for payment of capital to an infant at twenty-one or marriage. The question before the court was whether a married infant had an absolute right to call for her share, or whether the trustees and the court (to whom any discretion had been surrendered) still retained a discretion to withhold payment. Upjohn J., saying there was no previous authority or guidance in the textbooks, held the court had " an inherent jurisdiction with regard to the property of infants enabling it to inquire whether any proposed transaction is for the benefit of the infant or would be improvident " ([1956] 3 W.L.R., at p. 766; [1956] 3 All E.R., at p. 525). Thus, trustees who have power to distribute to infants must henceforth always consider whether such a course will further the best interests of the infant.

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## 3. *CHARITIES*

By A. Kiralfy, ph.d., ll.m., Barrister-at-Law

*Re Arthur McDougall Fund* [1957] 1 W.L.R. 81;
[1956] 3 All E.R. 867

*Educational charity—instruction in political science.*—Mr. McDougall bequeathed about £7,000 to a non-charitable body, the Proportional Representation Society, for the creation of a fund to be called after him. The report gives no further details about the terms of the will. It does seem as if this bequest ought to have been void for uncertainty, since it was not a beneficial gift to the Society,

made no mention of charity, and was completely uncertain in its objectives (*cf. Astor Case* [1952] Ch. 534; *Re Hughes* [1921] 2 Ch. 208, 212). The instant case was an originating summons for the proper construction of a trust deed drawn up by the Society to fulfil the provisions of the will, and reciting the fact of the bequest to them. The trust deed itself was held to be valid, as providing for exclusively charitable objects. The main object was "education or other charitable purposes beneficial to the community in connection with the art or science of government or other branches of political or economic science." *Re Berridge* (1890) 62 L.T. 365, 63 L.T. 470, would seem to have been in point but was not cited. The main argument turned on the question whether the deed envisaged merely political arguments in the sense of propagating particular partisan views. Upjohn J. held that it was not a partisan fund, and distinguished *Bonar Law Memorial Trust* v. *C. I. R.* (1933) 17 Tax Cas. 508, and *Re Hopkinson* [1949] 1 All E.R. 346. Political science is an academic study and the deed contemplated public instruction in this. All the trustees were members of the Society, but there was no reason to suggest that they would not carry out their obligations as trustees of the charity or would use the funds for their own purposes.

(Theobald 338)

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## 4. *WILLS*

By A. Kiralfy, Barrister-at-Law

*Re Quibell's Will Trusts* [1956] 3 All E.R. 679

*Bequest of shares—no ademption—substantial identity.*—The testator, a chemist, by his will left all the assets of his business to trustees, on trust to form a private company, the shares of which were to be given to his daughter on his widow's death. During his life the testator formed a similar company himself and transferred half the shares to his daughter, who also helped him in the shop. Vaisey J. held that the daughter was entitled to the balance of the shares on her father's death. The testator had simply anticipated his own plans and the shares existing at his death were substantially the same as shares issued by a company formed for the same purpose after his death. It would have been futile to defeat his clear and unchanged intention. The authority closest in point was in *Re Russell* (1882) 19 Ch.D. 432 where a testator who owned part of a business left his "share" to X and the testator subsequently acquired the rest of the business before he died, and X was held absolutely entitled. Another analogous case appears to be *Re Rhagg* [1938] Ch. 828, where A left his business to B, and A and B then became partners in the business,

and B was held entitled to the whole business on A's death. It will be noted that the testator in the present case had not tried to dispose of his shares to third parties and received anything else in return.

(Theobald 163, 201)

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*Re Atkinson's Will Trusts* [1956] 3 W.L.R. 900; [1956] 3 All E.R. 738

*Rule in Lassence* v. *Tierney and Hancock* v. *Watson* [1902] A.C. 14—*special form of accruer clause—survivor not privileged.*—Upjohn J. described this as a new point and it may be of some importance since the form used is a common form precedent and the result of the case, while not doubting the authority of *Re Litt* [1946] Ch. 154 on its facts, does contradict the general statement in Theobald derived from that case. Despite the obvious efforts of counsel and judge to clarify the issue in this case the impression obtained by a cursory reading is not clear and even repeated reading does not give one complete confidence, in view of the ambiguous "her share," an expression which might apply to either the share of Emily or of Constance. The effect, however, seems to be as follows: Property is given to Emily and Constance in equal shares with a direction for a settlement of each share on the legatee for life, with gifts over to issue. There is then an accruer clause requiring any lapsed interest to be held as an accretion to the other share and "on its trusts." Imagine that there had been no accruer clause, then each gift would have become absolute on the legatee's death, under *Lassence* v. *Tierney*, as neither Emily nor Constance ever had any issue. If, again, the accruer clause had given the share of the first to die to the other generally, then Constance would have taken Emily's share absolutely, as Emily died first. But the clause was construed here as linked with the trusts for life and remainders over, and divorced from the original outright gift. Hence there was no more reason why Constance's successor should take Emily's share rather than Emily's successor. As Constance had had no issue the "trusts" failed when she died and her own share became part of her estate. In the result Constance had properly had the income for life of Emily's share after Emily's death, but on Constance's death that share reverted to Emily's estate under the outright initial gift to Emily, and did not accrue to Constance's estate.

(Theobald 403)

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*Re Hayward* [1956] 1 W.L.R. 1490; [1956] 3 All E.R. 608

*A. E. A.*, 1925, *s.* 47 (1) (iii)—*advancements brought into account on intestacy—£500 nomination not an advancement for this purpose.* —Hayward had left his entire estate to his wife, who predeceased him.

The effect was that he died totally intestate, leaving an estate worth about £1,800. He had two sons, X and Y. During his lifetime he had nominated his elder son, X, to succeed to his post office savings and national savings certificates worth in all about £500. Y obtained letters of administration and X's personal representatives were bringing an administration action. Y claimed that the £500 ought to be brought into account. It was admitted that nominations could constitute an advancement. We know of no reported case, but, on principle, a provision to start on death, *e.g.*, a remainder on a life interest to the intestate, obviously can be. The main dispute was whether a sum of this kind could be an advancement without further evidence of the object which the intestate had had. Upjohn J. held that, on balance, the £500 was not an advancement by way of portion as understood in this part of the law (which is quite different from that dealing with resulting trusts). He considered its size decisive and disagreed with the view of Roxburgh J. in *Re Livesey* [1953] 1 W.L.R. 1114 that there must be positive evidence to support the construction of a gift as an advancement. There was therefore no duty to account for it. Proportionately to the whole estate it was admitted by the learned judge that the sum was not unimportant. This case seems to support a certain judicial reluctance to impose a duty to account in borderline cases.

(Theobald 659, 681)

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*In the Estate of Thomas* [1956] 1 W.L.R. 1516; [1956] 3 All E.R. 897

*A. E. A.*, 1925, *s.* 25—*order to account by summons in Probate Division; effect of revocation of grant.*—This is a short but important point in probate and administration. A deceased had been thought to have died intestate and administration on intestacy was granted to the defendant. A will was then found and pronounced valid by Davies J. who granted administration *cum testamento annexo* to the plaintiff. The plaintiff wished to have an account of the administration so far. There was a practice to allow this where a temporary administration was granted, which, in its terms, made it clear that a subsequent probate or administration might follow, *e.g.*, administration during the minority of an executor or on the basis of a draft will, pending further search for the terms of the original will. Karminsky J. held in the instant case that there was jurisdiction to order an account by the defendant by a summons in the Probate Division, and that there was no need to take proceedings in Chancery for an account or an administration action. Although the defendant could not have expected to be supplanted he was under a general duty to keep accounts, so presumably this worked no hardship. The wording of section 25 of the Administration of Estates Act, 1925, is very vague. The personal representative is required to deliver perfect accounts whenever lawfully required to do so. The valid revocation of his grant of administration on intestacy is certainly a lawful occasion and his successor as administrator with the will annexed is entitled to an

account of assets received and debts and expenses paid so far. To require further proceedings would be circuitous and expensive. It is difficult to see what objection the defendant had to doing so. Of course a surviving widow, say, of an intestate, might well have kept no accounts at all, not anticipating any other claimants!

(Williams on *Executors,* 466)

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## 5. *LANDLORD AND TENANT CASES*

By Donald Keating, b.a., Barrister-at-Law

*Duncan* v. *Hay* [1956] 1 W.L.R. 1329;
[1956] 3 All E.R. 555 (C.A.)

*Rent Acts—service tenancy—change of job but not of employment —new landlord's claim for possession—vendor and purchaser.*—A tenant was let a farm cottage by X in consequence of his employment on the farm. X subsequently gave the tenant notice to quit and sold the farm to D. The tenant remained in the employment of X but became a machine operator. D. sought possession of the cottage under paragraph (g) of Schedule I of the 1933 Act and satisfied the county court judge that he reasonably required possession for a man in his employment to work on the farm. The learned judge, however, refused to grant an order on the grounds that the tenant had not, as the paragraph further required, ceased to be in "that employment" in consequence of which the cottage was let to him. D. appealed.

The short point was whether "that employment" referred to the relationship of employer and employed in consequence of which the premises were let, or whether it referred to the particular employment in consequence of which the premises were let. Denning L.J., in a dissenting judgment, said that apart from authority he would have thought that "that employment" referred to the employment on the farm, and that when the tenant ceased to work on the farm "that employment" had ceased so that the new farm owner could claim possession. One feels that this was probably what Parliament meant to enact but the majority of the court (Hodson and Morris L.JJ.) preferred the view taken by the county court judge. Applying *Munro* v. *Daw* [1948] 1 K.B. 125 (C.A.), they held that "that employment" referred to the tenant's employment by X. It was in consequence of that employment that the cottage was let to him and as that employment had not ceased all the conditions of the paragraph were not satisfied and D. could not have possession.

The term "tied cottage" is sometimes used in connection with paragraph (g). In broad terms one can say that such a cottage as in this case is not tied to the land but to the employer who let it. This must be borne in mind by those acting for purchasers of farms and

others who require to use houses on the land for employees of the farm, the business or as the case may be. Except where they are satisfied that the existing service tenant will transfer his services to the purchaser they should insert a special condition in the contract requiring the vendor to dismiss those employees whose houses are required.

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*Austin Reed, Ltd.* v. *Royal Insurance Co., Ltd. (No. 2)*
[1956] 1 W.L.R. 1339; [1956] 3 All E.R. 490

*Landlord and Tenant Act, 1954, Part II—statutory extension of tenancy pending proceedings—application for new tenancy refused—appeal dismissed—date of expiry of tenancy.*—Section 64 (1) prolongs a tenancy, which would otherwise be determined, until three months after the date when the application for a new tenancy is finally disposed of. Section 64 (2) says " . . . finally disposed of shall be construed as a reference to the earliest date by which the proceedings on the application (including any proceedings on or in consequence of an appeal) have been determined and any time for appealing or further appealing has expired. . . . "

The tenant's application for a new tenancy was refused and his appeal was dismissed by the Court of Appeal. Leave to appeal to the House of Lords was refused by the court and no application was made to the House of Lords for leave to appeal. It was held that the application was " finally disposed of " when the time expired within which a petition could be lodged with the House of Lords for leave to appeal, *i.e.*, one month after the decision of the Court of Appeal. Therefore the tenancy continued until four months after that decision.

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*H. L. Bolton (Engineering) Co., Ltd.* v. *T. J. Graham & Sons, Ltd.*
[1956] 3 W.L.R. 804; [1956] 3 All E.R. 624 (C.A.)

*Landlord and Tenant Act, 1954, Part II—landlords' intention to occupy—how intention proved—whether landlords had " purchased " within five years.*—This case decides two points of great practical importance under the Landlord and Tenant Act, 1954. The first is that " purchase " in section 30 (1) (g) means " bought for money " and not the old technical meaning of the acquisition of land other than by descent or escheat. The second is that a limited company's intention under the Act can be inferred from the intention of its officers and agents and other relevant acts and circumstances; evidence of a formal resolution at a meeting of the directors is not essential. The second point will not be further discussed here because every case must turn on its own facts. But the first point requires some elaboration.

In 1941 Company A purchased freehold premises and leased them to Company B, which in turn sublet part to Company C. In February, 1955 Company B surrendered its lease (by operation of law) to Company A so that Company C became the direct tenant of Company

A. Company A then served notice of termination under the Act on Company C, which in due course applied for a new tenancy. This was opposed by Company A on the ground, *inter alia,* that it intended to occupy the holding for its own business within the meaning of section 30 (1) (g).

This ground of opposition fails if the landlord's interest, " or an interest which has merged in that interest and but for the merger would be the interest of the landlord, was purchased or created after the beginning of the period of five years which ends with the termination of the current tenancy." It was said for the tenant that the landlord's interest was the lease of Company B acquired in 1955 and this was accepted. Further it was said that this interest had been " purchased." This argument was rejected and the same rule was applied as in hardship cases under the Rent Acts, that " purchase " has its ordinary meaning of " to buy for money." Thus there would have been a purchase in this case if the landlords had paid a substantial sum of money for the surrender.

It was said *obiter* that the word " created " had been inserted to prevent a landlord avoiding the provisions of the Act simply by taking a long lease of the premises instead of buying the premises.

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*Le Witt* v. *Brookes* [1956] 1 W.L.R. 1438; [1956] 3 All E.R. 676 (C.A.)

*Landlord and Tenant Act,* 1954, *Part II—application to county court to settle terms of new tenancy—amount of rent—costs—no analogy with payment into court.*—This case decides that where there is an application to the county court to settle the terms of a new tenancy and the rent is settled at less than the amount offered by the landlord no analogy should be drawn between the landlord and a defendant who has paid too little into court in considering the question of costs. The county court judge in his discretion should consider, *inter alia,* the reasonableness or unreasonableness of the offers by each side. Where, as in this case, the court fixed a rent intermediate between counter-offers the appropriate order was no order as to costs, although (*per* Hodson L.J.) this was not a hard and fast rule.

See also *Gold* v. *Brighton Corporation* [1956] 1 W.L.R. 1291; [1956] 3 All E.R. 442, C.A.

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*Wheeler* v. *Mercer* [1956] 3 W.L.R. 841; [1956] 3 All E.R. 631 (H.L.)

*Landlord and Tenant Act,* 1954, *Part II—tenancy at will—whether Act applies.*—The Landlord and Tenant Act, 1954, Part II does not apply to tenancies at will. This has been decided by the House of Lords reversing the decision of the Court of Appeal to the contrary. Their lordships considered the various provisions of the Act and demonstrated that they were not apt to apply to a tenancy

at will. In this case the tenancy at will arose by the tenant holding over with the consent of the landlord pending negotiations for a new lease and the tenancy at will therefore arose by implication of law. Viscount Simonds reserved the exceptional case of a tenancy at will expressly created by contract, but in the light of the speeches of the other members of the House it seems that even an express tenancy at will is not covered by the Act.

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*Church Commissioners for England* v. *Ve-Ri-Best Manufacturing Co., Ltd.* [1956] 3 W.L.R. 990; [1956] 3 All E.R. 777

*Law of Property Act,* 1925, *ss.* 87, 146—*Leasehold Property (Repairs) Act,* 1938, *s.* 1—*whether mortgagee should be served with notices—tenants' right to invoke mortgagees' counter-notice.*—The landlord served on the tenant and on the tenants' mortgagees notices of disrepair pursuant to section 146 of the Law of Property Act, 1925 and conforming with section 1 of the Leasehold Property (Repairs) Act, 1938. The mortgagees served a counter-notice under the 1938 Act but the tenants did not serve a counter-notice. The landlords issued a writ for damages and possession against the tenant for breach of covenant without first obtaining the leave of the court. The tenants contended that the counter-notice served by the mortgagees precluded the landlords from bringing the proceedings without leave.

It was held: (1) that a mortgagee is a "lessee" for the purposes of sections 1 and 6 of the Law of Property Act, 1925, and section 1 of the Leasehold Property (Repairs) Act, 1938, but; (2) that a mortgagee has no right to receive a notice under the Acts; (3) that as the landlords had served the lessee in possession, the tenant, they could proceed against him without leave for he, having served no counter-notice himself, could not rely on the mortgagees' counter-notice.

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*Driscoll* v. *Church Commissioners for England* [1956] 3 W.L.R. 996; [1956] 3 All E.R. 802 (C.A.)

*Issue of writ for forfeiture—tenant's application to Lands Tribunal under section* 84, *Law of Property Act,* 1925—*effect of writ.*—In 1949 the tenant applied to the Lands Tribunal under section 84 of the Law of Property Act, 1925, for the discharge or modification of covenants in several leases as to user of the premises. In 1952 the landlords issued writs claiming forfeiture for breach of covenants. In May, 1956, the Lands Tribunal dismissed the tenant's application. In July, 1956, the tenant was granted relief from forfeiture. The tenant appealed from the decision of the Lands Tribunal. The substantive point, whether or not the covenants were obsolete, is not discussed here, but an interesting preliminary point was raised by the landlords. They said that the issue of the writ unequivocably determined the leases so that there were no subsisting covenants to be

discharged or modified and the Tribunal had no jurisdiction in the matter for the tenant was not before the Tribunal as a "person interested." This argument was rejected. It was held that although the issue of the writ was an unequivocal election to forfeit, the rights of the parties were not finally determined until the result of the action was known; the covenants were potentially good and the tenant had a *locus standi* to appear before the Tribunal.

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## 6. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports it is cited from *Annotated Tax Cases* (A.T.C.) or *Taxation Reports* (T.R.).)

*Gatehouse* v. *Vise* (*Inspector of Taxes*) [1956] 1 W.L.R. 1509; [1956] 3 All E.R. 772 (Ch.D.)

*Income Tax—Schedule A—Single house let in flats—Common landlord*

*Statutory provisions*: Income Tax Act, 1918, Sched. A, No. VII, rr. 8 (c) and 12 (now Income Tax Act, 1952, ss. 109 (1) (c) and 113).

*Point*: It would appear that where a block of flats nevertheless constitutes "a house," and not a number of separate houses for the purpose of charge to Schedule A tax, that tax will be exigible from the landlord, and not from the tenants of the individual flats, if he is the common landlord of all the flats. Where, as in the present case, the lettings have been made at high premiums and nominal rents, so that the tax cannot be "passed on" to the landlord by deduction from rent, the question of who may be assessed not only affects the ability of the Revenue to collect but also the ultimate incidence of the tax. Until recently it has been the practice of the Revenue, despite the old authority of *Att.-Gen.* v. *Mutual Tontine Westminster Chambers Association, Ltd.* (1876) 1 Ex.D. 469, to assess the tenant under what is now Income Tax Act, 1952, s. 113, treating the house as "divided into distinct properties and occupied by distinct owners or their respective tenants." Mr. Justice Danckwerts held, however, that, where there is a common landlord the property is "let in different apartments or tenements and occupied by two or more persons severally" within section 109 (1) (c) and the common landlord must bear the tax.

The judgment is disappointingly brief in view of the lengthy argument and apparently establishes a rule which will work considerable hardship. Persons who have purchased houses already converted into flats, with perhaps vacant possession of one flat, the other flats having been "sold" reserving nominal rents, may now find themselves saddled with a large Schedule A claim and no rents

to offset it. Whether such hardship may call forth some ameliorating legislation amending the somewhat archaic structure of the tax is doubtful, for even the Royal Commission dealt somewhat cursorily with the immense difficulties caused by " selling " leases. Care should be taken to advise all clients purchasing the freehold of any such property of this continuous liability. So far as the landlord intending to realise his property by leasing for premiums is concerned, he must either cut his profit and reserve sufficient rent or else sell his reversion to the tenants: yet another version of " flying freeholds "!

*Facts and decision*: The property in question consisted of four garages on the ground floor and five residential flats on the first floor. The front doors of the flats opened onto a balcony to which there were two common staircases; there was no other means of access to the flats. The taxpayer, the tenant of flat No. 3 under a twenty-two-year lease at £1 a year for which a premium of £2,750 had been paid, was assessed to tax under Schedule A in the sum of £201. The Commissioners found that the flats were part of a single house or building, which finding was not contested on appeal, but held the taxpayer rightly assessed under what is now Income Tax Act, 1952, s. 113.

*Held*: following the *Westminster Chambers* case (*supra*) that the assessment should have been made on the landlord, who was the common landlord of all the flats, and that the appeal should be allowed. The fact that the lease was a " short lease " did not appear to be material.

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*Bridges* v. *Hewitt* [1957] 1 W.L.R. 59;
[1956] 3 All E.R. 789 (Ch.D.)

*Income Tax—Gift or Profit from Office—Gift by shareholders*

*Statutory provisions*: Income Tax Act, 1952, Sched. 9, r. 1 (now Finance Act, 1956, Sched. 2, r. 1 ).

*Point*: Three points appear from this case to add to the store of learning on the thorny question of whether money or money's worth received by an employee or the holder of an office is a gift and untaxable or part of his taxable receipts and in the latter case, how it is to be treated. The first two seem to call for little comment, the third establishes a wholly new principle.

The sum here in question was held a taxable profit for it was taken pursuant to an agreement in writing in which it was expressed to be in consideration of past and future services of the recipient director. It was not originally intended so to be, but either the parties reached a new agreement or else they bound themselves by the " form " they gave the transaction, evidence to contradict the written agreement being inadmissible. Being expressed as a lump sum to be given in respect of a number of years' service, it was nevertheless taxable as a whole in the year of receipt and could not be " spread over." Either of these unfortunate results could have been avoided by drafting the

agreement in a different form, and the necessity for eliminating the unnecessary from drafts on which taxation consequences depend is once more hammered home.

The most interesting point was, however, the decision as to when the "receipt" by the taxpayer took place. The agreement, which bound the "donor" to transfer shares at a future date, was made in 1945. The transfer actually took place in 1953. Despite the fact that the agreement was legally binding and valuable in 1945, the relevant receipt was held to have taken place in 1953. It is by no means clear upon what basis the learned judge so decided for he relied on no authority and gave no reason save that "the transfers of the shares were profits of the taxpayers' offices." Why was the benefit of the agreement received in 1945 (now out of time for assessment) not such a profit? Admittedly the agreement was not realised by sale or other exploitation but then neither were the shares. Is it that the benefit of an agreement cannot be a profit? It cannot be that the additional value received in 1953 when the shares were transferred before the due date exceeded the value of the agreement by so much as to render the latter of no moment for that "early" transfer was not made for the same consideration. Mr. Justice Danckwerts expressly disclaimed any reliance upon uncertainty of valuations. We are left, it would appear, with the principle that an agreement to provide specified remuneration is not itself remuneration until cash or kind is received, thus driving a wedge between Schedule D and Schedule E.

*Facts and decision*: The founder and principal shareholder of a company died leaving his shareholding to his wife for life with remainder to his two sons equally. The two sons, directors of the company, considered that their father should have left part of his holding to two other directors who had helped build up the firm. Feeling themselves morally bound the sons, in 1945, agreed to give the two directors shares from their father's holding on the death of the life tenant their mother, no conditions being attached to the transfer. A written agreement was drawn up and executed later in that year in the case of each director, and it being considered that consideration was necessary to render the covenant to transfer the shares legally binding, a covenant was inserted binding the director in question to work a further four years for the company. The shares were in fact transferred shortly before the life tenant's death in 1953. The directors were assessed to tax on the value of the shares transferred in 1953 for the year 1953/1954 and successfully appealed against the assessment to the Special Commissioners. The Crown appealed to the High Court.

*Held*: The appeal must be allowed. Although prior to the written documents the promise to transfer shares was purely voluntary and any transfer pursuant thereto would have been a present and not assessable to income tax, the transaction was changed by the document. No evidence to contradict the document, which was unambiguous, was admissible, and that stated the consideration to be the services of the taxpayer in each case. The assessable income was received in 1953 and not in 1945 and could not be spread over the years of service.

It is understood that an appeal against this decision may be made.

*Re Stratton's Disclaimer, Stratton* v. *C. I. R.*
[1956] 3 W.L.R. 1054; [1956] 3 All E.R. 862 (Ch.D.)

*Estate duty—Gift within five years of death—Disclaimer*

*Statutory provisions*: Finance Act, 1940, s. 45 (2); Finance Act, 1894, s. 2 (1) (c).

*Point*: Although the disclaimer of a specific legacy or devise renders the gift void *ab initio*, nevertheless between the death of the testator and the disclaimer by the beneficiary the latter has an inchoate right. Disclaimer of that right is an extinguishment thereof and such extinguishment is at the expense of the disclaimant. In the absence of evidence to the contrary the disclaimant must be presumed to have intended to produce the results which naturally follow from his disclaimer and thus that benefit should accrue as in fact occurs. Hence, by virtue of the Finance Act, 1940, s. 45 (2), the disclaimer is a disposition by the disclaimant to the person benefited thereby the property taken under the disposition being the benefit conferred. One useful limitation to the wide words of section 45 (2) appears from this case, namely, that there must be an intention to make a gift or, at least, lack of evidence that no gift was intended. It would thus seem that the " extinguishment " which sets the section in motion must be affected by the purported disponor or at least with his consent. In this respect the section is apparently different in its effect from section 43 of the same Act under which section the determination of a limited interest may be brought about by any person and yet the section operates.

*Facts and decision*: The testator specifically devised and bequeathed certain freehold houses and policies of insurance to his widow and gave his residuary estate to his three sons in equal shares. The testator died in 1949 and in 1951 no assent in favour of the widow having been made she disclaimed all the gifts to her, the disclaimer containing nothing to indicate the intention or motive of the widow in executing it. The widow died in 1953 and thereupon the Revenue claimed estate duty in respect of the disclaimed property by virtue of the Finance Act, 1940, s. 45 (2) and the Finance Act, 1894, s. 2 (1) (c). The sons, who as residuary legatees in fact benefited resisted the claim.

*Held*: Duty was exigible on the value of the interests disclaimed which had accrued to the remainderman. Construing section 45 (2), Mr. Justice Danckwerts held that the words " debt or other right " must bear their natural meaning and that " other right " means any kind of right having a value of some kind or other. Similarly, " at the expense of the deceased " bears its natural meaning implying merely sacrifice by the deceased. Finally, there must be a person " for whose benefit the debt or right was extinguished " and this necessitates an actual person intended to be benefited and who does benefit. Mere benefit is not sufficient if there was no intention, but such intention may be presumed if the natural result of the extinguishment and no contrary evidence is forthcoming.

## THE LIBRARY

*Pension Schemes and Retirement Benefits.* By Gordon A. Hosking, F.I.A., F.R.S.S., M.I.T. Sweet & Maxwell, Ltd. viii and 372 pp. (£2 2s.)

*Pension Scheme Precedents.* By William Phillips, Barrister-at-Law. Sweet & Maxwell, Ltd. xx and 548 and (index) 17 pp. (£4 4s.)

Successful pension and retirement benefit schemes are the product of the fruitful collaboration of a number of professional persons, particularly actuaries, accountants and lawyers. Mr. Hosking's book gives a general picture of the subject from all aspects, but it would be quite wrong to suppose that this results in superficial treatment; on the contrary, the legal side is given the most careful consideration and the fifty-six pages of appendices are mainly concerned with the relevant statutory provisions. In this difficult and complex subject, the author chose very wisely when he decided on treatment by "short takes"; there is a large number of chapters—there are in fact forty-three—but they are all short.

An employer has to decide whether a staff pension scheme is to be contributory or non-contributory, whether the pension is to be a flat-rate pension or one related to salary, whether there is to be a capital payment on retirement or not, whether it is to be a privately administered scheme or one arranged through a Life Office and so on. To help him to come to a decision numerous factors, many legal and many not, have to be taken into account. Mr. Hosking's explanation of the income tax provisions affecting the question is extremely lucid. In Chapter 10, a chapter of barely five pages, he sets out the general principles which are the key to the whole position and in subsequent chapters he deals with the relevant sections of the Income Tax Act, 1952, in more detail. It is a tribute to the author that he leads the reader so gently that the latter may conclude that the provisions are not nearly so complicated as they in fact are. Typical of Mr. Hosking's style is the following: "The broad principle of section 379 [of the Income Tax Act, 1952] is that, provided everything which is paid out of an employees' fund during a member's lifetime is either taxable or would be taxable if it were not for the personal allowances of the beneficiary, then everything, with minor exceptions, which goes into the fund may reasonably be permitted to be tax-free whether it be contributions by employer, by employee or the interest earned upon invested assets." He then goes on to explain just what this involves, and if one then comes back to the statement it can be more fully appreciated how shortly and clearly the effect of the section is summarised.

Chapters 34 and 35 contain some useful drafting points, but in this branch of practice the legal considerations, even for the draftsman, are only part of the story and the chapters concerned with non-legal subjects, such as investment and the advantages of privately administered schemes as opposed to Life Office schemes, are of importance to the legal practitioner who is to give his client comprehensive advice. Not all the chapters will appear of equal importance to different readers. The solicitor may feel he can skip those on actuarial valuation, but to the uninitiated, such as the reviewer, they are fascinating.

It is clear that the author has considerable practical experience and does not appear to have an axe to grind. The book is designed to be read right through and it is so readable that this is a pleasure, and, when it has been

read through, it is then a very good reference book. It is completely up to date, incorporating as it does the provisions of the Finance Act, 1956. When dealing with questions such as the cost of administration and investment policy, it would be very easy to use wide generalisation of no practical assistance or meaningless clichés, but the author does not fall into this trap; he has something useful to say on each aspect and says it without the necessity of padding. We have only one small criticism, that the arrangement could be a little improved. For example, inequities and eligibility hardly deserve chapters to themselves and, in any event, do not appear to have been placed in any logical position.

In short Mr. Hosking's book is excellent and may be recommended without qualification.

Up till now the draftsman has been poorly served with precedents for pension schemes and, so far as we know, there was no comprehensive collection of them. Such as there were could not be regarded as satisfactory with the exception of those in that excellent precedent book, *Potter and Monroe*. We must, therefore, welcome Mr. Phillips's book as filling a serious gap in the draftsman's armoury, but it is a difficult, and unnecessarily difficult, book. Part I consists of seven chapters dealing with the law and we found this really hard going. The historical survey in Chapter 1 is likely to leave the uninitiated bewildered. The reader is then led into a consideration of sections 387 and 388 of the Income Tax Act, 1952, instead of coming to the more important section 379. His task is made even more difficult by the quotation of whole sections of the Act in the main text. The side headings are, in general, unhelpful. This Part compares very unfavourably with Mr. Hosking's book.

Part II deals with section 379 schemes, Part III with other schemes, Part IV with individual clauses and rules, Part V with special cases and Part VI with schemes already in existence. These Parts cover almost all cases with which a practitioner is likely to be concerned, but there does appear to be one significant omission; there is no precedent for an excepted provident fund as defined by section 390. It can be hardly said that these are of no importance, for the author himself states that schemes are frequently established under this section. In the book somewhere will be found most, if not all, the clauses that the draftsman is likely to require, but hunting down the clauses can be a tiring task. If we take the precedent in Chapter 11, one for a contributory pension scheme, which many would consider the most important of all, we find that the rules subsequent to rule 26 are merely given the following terse reference: "27 *et seq.* [*Part IV, post*]." Part IV consists of twelve chapters containing numerous forms for individual clauses and rules. Another example of hopeless cross-referencing is to be found in paragraph 1025. This defines "Pensionable Service" and includes a reference to "Added Years." A footnote directs the reader to paragraphs 1127 and 1318. Paragraph 1127 contains a definition in terms so nearly identical with that in paragraph 1025 that one wonders whether there is any reason for the slight differences and a footnote to this paragraph directs one to paragraphs 3122 *et seq.* which deal with Added Years; paragraph 1318 contains a rather different definition of Pensionable Service, but no cross-reference at all, though there is an express reference in the definition itself to what turns out to be paragraph 1341. Thus, at the end of this trail, we find that the appropriate clause dealing with Added Years to be inserted in the original precedent is to be found in paragraphs 1341 and 3122 to 3127, none of which is referred to in the original footnote.

Everyone is entitled to use his own style of drafting, but many practitioners will not be happy with the author's. For example, his standard method of spreading his definitions over three or more clauses or rules strikes us as unusual and awkward; nor are we happy that the proper way to give a substantive power to terminate payments is to say that the Company shall make payments "subject to the right hereby reserved" to terminate them;

nor do we think it right to say that, where it is provided that the trustees "shall" submit a scheme to valuation by the actuary, it is sufficient if the scheme was submitted prior to execution of the trust deed. There are other examples of slovenliness: for example, in paragraph 1002 the third recital is clearly wrong and in the next paragraph there is a reference to "Main Object," apparently in place of "Main Purpose"; paragraph 1247 contains a rule headed "Committee's functions," but neither the rule nor the other rules in the precedent deal with the powers, purposes or objects of the Committee.

It is nearly always easy to find slips and errors in any textbook and, had these been isolated cases, it would not have served any useful purpose to draw attention to them, but, first, they are too numerous to be passed over without a protest and, secondly, the draftsman may, as a result, be tempted to alter some phrase such as "exceptional cases of ill-health," which is hallowed by the Inland Revenue. Unfortunately, some of the draftsmanship goes beyond the bounds of inelegance and enters the realms of the unsafe or unsound.

We have dealt with Mr. Phillips's book at some length because it is an important addition to the standard precedent books. Our criticism is mainly not with its substance but with its presentation. The author should have submitted the whole text to someone to go through before publication, preferably someone without any intimate knowledge of the subject. Much of the irritation and difficulty which the users of the book are going to find could in that way have been considerably lessened. As, presumably, the publishers are responsible for the get-up of the book they must bear some of the blame.

If the question is asked, are the two books worth buying?, the answer in both cases is "Yes"; in the case of Mr. Hosking's book without reservation; in the case of Mr. Phillips's book on the ground that it is the only complete precedent book on the subject, written by somebody who obviously knows the subject, though the book will have to be used with considerable discretion.

E. F. G.

*A Handbook on the Administration of Estates Act (Northern Ireland), 1955.* By William A. Leitch, ll.b., Solicitor. Published by the Incorporated Law Society of Northern Ireland. xix and 191 and (index) 37 pp.

A serious handicap from which practitioners suffer in smaller jurisdictions, such as Southern Rhodesia, Western Australia and Northern Ireland, to take three examples at random, is lack of appropriate textbooks. They generally have to make do with the textbooks of other jurisdictions supplemented by inadequate local works. To Northern Irish practitioners, Mr. Leitch's book will be invaluable. Prior to the passing of the Act, the Northern Irish law of intestacy was complicated in the extreme, following the pre-1926 English law to a large extent, but with special local exceptions. The new Act in general follows the modern English law of intestacy but with adaptations calculated to suit local requirements. Thus, the surviving spouse takes rather less than here, the Crown does not take so long as there are traceable relatives, however remote in degree, and infants' interests are vested and not contingent. In assimilating the law governing realty to that governing personalty, the stupid English distinctions between realty and personalty in relation to the payment of legacies are obliterated. Northern Ireland has undoubtedly taken advantage of English experience on the operation of the intestacy laws since 1925, and it is, therefore, somewhat surprising to find that, following English law, illegitimate children are still excluded on the intestacy of the mother if she leaves a legitimate child, a rule which seems pointlessly harsh. One subsection that intrigues us is section 4 (1): "The term 'real representative' shall cease to be used. . . ." What happens if it is used? Will the user be hanged,

imprisoned or fined? Will the instrument using the awful phrase be void or will the phrase be treated as *pro non scripto*? We rather suspect that nothing at all will happen.

Mr. Leitch's book is, so far as we can judge, a really first-class commentary on the new law. Although the commentary is section by section, a method we dislike, there is no doubt that the author has made a thorough job. He has cited a wealth of authority in support of his observations and, as a result, the new Act has the appearance of being of full age rather than a new-born babe. The author's style is lucid and is relieved from time to time by delightful light touches. Who could resist the author's argument in favour of making a will under which the testator's property will pass as on intestacy: "Lastly, the testator gains the satisfaction of having actively exercised his bounty: the warm spark of conscious generosity is missing if he merely leaves his estate to devolve in whatever way the law happens to lay down for those who die intestate."

The book has a number of useful appendices containing the old and new tables of distribution and precedents. The Probate Registry Rules might with advantage have been put in an appendix rather than tucked away, rather inelegantly, in a note to section 20. At the beginning of the book we find acknowledgments to certain "authors of a Digest of Cases decided in Northern Ireland between 1922 and 1951, which, if published, would greatly benefit lawyers here"; to Mr. Stephens and the compositors for much forbearance with a difficult manuscript and to "my wife for a different kind of forbearance"; and to the Ministry of Finance who co-operated with the Incorporated Law Society of Northern Ireland "by undertaking to bear a share of the inevitable losses incurred in [the book's] production." May we express the hope that the sales of the book will reduce this loss to as low a figure as possible and then—who knows?—the Digest of Cases might be published. At any rate, the sponsors of the book should be more than satisfied that their money has been wisely spent.

E. F. G.

*Income Tax, Law and Practice.* By Cecil A. Newport, f.a.c.c.a., Fellow of the Institute of Taxation and H. G. S. Plunkett, Barrister-at-Law, formerly one of H. M. Inspectors of Taxes. 27th ed. London: Sweet & Maxwell, Ltd. xi and 444 pp. (£1 10s.)

The industry of the editors in keeping the leading students' textbook on the taxation of income up to date, despite the constant changes of the law in this field, renders this volume, like its predecessors, invaluable to the practitioner. In a concise form the practitioner may here find a lead on almost every tax problem, in a volume light enough to travel comfortably in the briefcase.

The changed structure of Schedule E has been faithfully reflected in the text, though the sweeping pension provision changes also introduced by the 1956 Finance Act are relegated to a three-page appendix. The fresh treatment of purchased life annuities, more complicated than at first appears, has been stated briefly but unfortunately without a worked example to illustrate the effect. No-one expects in a work of this size a reasoned explanation of new and involved provisions, but the merit of *Newport and Plunkett* has always been the incorporation of examples explaining in figures those matters where space limits textual description. The examples, clearly set out and up to date, are sufficient of themselves to repay investment in this book by all concerned with accrued tax liability.

The publishers must be congratulated on the low cost of this digest, which provides a reliable guide to the uninitiated and keeps the initiated up to date in addition to being the most valuable *aide memoire* on the market.

D. R. S.

*The Law relating to Charities in Ireland.* By V. T. H. Delany, M.A., LL.D. Thom & Co. (Dublin). 248 pp. (60s.)

The publication of law books in Ireland is a matter of some difficulty, in view of the small size of the legal profession. The differences in religion and in legislation between Britain and Ireland are so considerable, however, and the Irish case law so rich, that a separate monograph was really overdue to expound the existing law, the previous treatise dating from 1906. Dr. Delany has produced a learned and fully documented work, with considerable historical narrative. Obvious topics like masses for the dead, contemplative orders and religious schools are fully considered. Much of the book may repay the study of English lawyers, though much is also exclusively concerned with local legislation. The learned author appears to do less than justice to *Re Chardon* [1928] Ch. 464, and pays less attention to *Re Flinn* [1948] Ch. 241, than to other cases on the same subject. He feels that *Re Caus* [1934] Ch. 162 is of doubtful validity in England; it is rather frightening to read that most charitable gifts in Ireland are now for masses for the dead (p. 59). Religion is writ large in this book as in the history of Ireland. Less attention is paid to the scientific side of charity, though there is an indirect reference to this at p. 87, a gift to the Royal College of Surgeons in Ireland. The "amenity" type of case is not stressed, though *Baddeley's* case [1953] Ch. 504, is referred to on another point. Irish law seems backward-looking in this connection. All in all Dr. Delany's book is good enough for one to wonder why it has no English equivalent of equal merit and similar handy dimensions.

A. K. R. K.

We have also received:—

*House Conversion and Improvement.* By Felix Walter, F.R.I.B.A. The Architectural Press. 257 pp. (£2 2s.)

There is a great deal of old property which still has a span of useful life before it but which is quite useless as single residences because of its size and old-fashioned lay-out. The Government has done a good deal to encourage the conversion and improvement of such property and this book is a study of the practice and economics affecting the subject. It should prove of great benefit to architects and builders. It is lavishly illustrated, mainly with reference to actual developments that have been carried out. It is very well produced. There are two or three chapters on legal aspects, but these are not really written for lawyers.

*A Guide to Business and Professional Tenancies.* By K. R. Bagnall, LL.B., Barrister-at-Law. Shaw and Sons, Ltd. xxvi and 256 and (index) 13 pp. (£1 15s.)

*Adoption of Children.* Fourth edition. By J. F. Josling, Solicitor. Oyez Practice Notes. The Solicitors' Law Stationery Society, Ltd. 99 pp. (12s. 6d.)

Four editions of this little booklet in nine years tell their own story.